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In The

Supreme Court of the United States

October Term, 1994

JOSEPH R. MATTIOLI, ROSE MATTIOLI and THE POCONO INTERNATIONAL RACEWAY, INC.,

Petitioners,

v.

TUNKHANNOCK TOWNSHIP, TUNKHANNOCK TOWNSHIP RESIDENTS COMMITTEE, CHARLOTTE DAVENPORT, JAMES G. DAVENPORT AND JAMES R. DAVENPORT and THE CORTRIGHT ROAD RESIDENTS,

Respondents.

Petition For A Writ Of Certiorari To The Commonwealth Court Of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI OF JOSEPH R. MATTIOLI, ROSE MATTIOLI AND THE POCONO INTERNATIONAL RACEWAY, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Are the due process and equal protection rights of citizens violated when a state court holds that, solely because those citizens are related to each other, i.e. a "family," their petition for incorporation of a borough must be denied, notwithstanding the Court's finding that all of the legal requirements for incorporation of a borough had been satisfied?

2. Does the retroactive application of a statutory amendment, which changed the requirements for the incorporation of boroughs, violate due process when the amendment explicitly precludes retroactive application, and when all *applicable* statutory and case law requirements have been met?

PARTIES TO THIS PETITION

Petitioners:

Joseph R. Mattioli, Rose Mattioli and The Pocono International Raceway, Inc.

Respondents:

Tunkhannock Township
Tunkhannock Township Residents Committee
Charlotte Davenport, James G. Davenport
and James R. Davenport
The Cortright Road Residents

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TUNKHANNOCK TOWNSHIP, TUNKHANNOCK TOWNSHIP RESIDENTS COMMITTEE, CHARLOTTE DAVENPORT, JAMES G. DAVENPORT AND JAMES R. DAVENPORT and THE CORTRIGHT ROAD RESIDENTS,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI OF JOSEPH R. MATTIOLI, ROSE MATTIOLI AND THE POCONO INTERNATIONAL RACEWAY, INC.

The Petitioners pray that a Writ of Certiorari issue to review the Order and Opinion of the Commonwealth Court of Pennsylvania decided July 13, 1994.

OPINIONS BELOW

The Order of the Supreme Court of Pennsylvania dated November 17, 1994, denying the Petition for Allowance of Appeal has not been reported officially and appears in Petitioners' Appendix A ("App. A ___") at App. A16. The Opinion and Order of the Commonwealth Court of Pennsylvania of which review is sought is reported at ___ Pa. Commw. ___, 646 A.2d 6 (1994) and appears at App. A1-14 and App. A15. The Opinions and Orders of the Court of Common Pleas of Monroe County, which have not been reported officially, appear at App. A29-33 and App. A39-51.

STATEMENT OF JURISDICTION

The Order and Opinion of the Pennsylvania Commonwealth Court was filed on July 13, 1994. The Pennsylvania Supreme Court's Order denying Petitioners' Petition for Allowance of Appeal is dated November 17, 1994, and was docketed on November 21, 1994. This Court's jurisdiction arises pursuant to 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this Petition, and are set forth in the Appendix beginning at App. A62.

1. U.S. Const., 5th Amendment, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U.S. Const., 14th Amendment, § 1, which provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The Pennsylvania Borough Code, 53 P.S. §§ 45201 and 45202. App. A62-63.

4. The 1992 Amendments to the Pennsylvania Borough Code, 53 P.S. §§ 45201 and 45202. App. A65-67.

STATEMENT OF THE CASE

Introduction

On October 5, 1992, Joseph R. Mattioli, his wife, Rose Mattioli, and the Pocono International Raceway, Inc., filed with the Court of Common Pleas of Monroe County a Petition for Incorporation of the Borough of Pocono Raceway. The statutory procedure for the incorporation of a borough was thus commenced and, some fourteen months later, culminated in a determination by all fact-finders, including all five members of the Borough Advisory Committee and the Court itself, that each and every statutory and case law criteria for the incorporation of a borough had been satisfied by the Petitioners. As stated in the report of the Borough Advisory Committee in referring to the area to be included in the proposed borough:

> . . . the primary current provider of municipal-type service is not the municipality, but Pocono Raceway. The Township has not, and possibly cannot provide the level of municipal functions and services this area currently requires, and it is highly unlikely that it could, or would provide the additional level of services that are necessary if the area is to be more intensely developed.

Indeed, the trial court not only agreed with the Advisory Committee, but made its own specific findings that the proposed borough (1) had the ability to obtain or provide adequate and reasonable community support services such as police protection, fire protection, and other community facilities and services (December 20, 1993 Opinion, p. 3, App. A41); (2) had existing and/or potential,

commercial, residential and industrial developable areas or could create an industrial area if desirable (December 20, 1993 Opinion, p. 4, App. A42); (3) could provide finances to support itself (December 20, 1993 Opinion, p. 4, App. A42); (4) is a harmonious whole with common interests and problems which can be properly served by a borough government (December 20, 1993 Opinion, p. 9, App. A46); and (5) had "geographic integrity." The Court therefore concluded that the proposed borough had "common interests and needs that could best be served by a borough government." (December 20, 1993 Opinion, p. 9, App. A46 and App. A48).

Despite these determinations, the trial court denied the Petition because of its unspecified fear of the "concentration of political power among a small family group" (December 20, 1993 Opinion, p. 13, App. A50) which, the Court stated (again, without specificity and without reference to any evidentiary support) "has great potential for misconduct" (*ibid.*, App. A50). In short, the Court denied the Petition on the basis that a "family" would be operating the borough government, disregarding the fact that all statutory and common law requirements had been met, and further disregarding the undisputed need for a borough form of government if the proposed development of this area of the Poconos was to take place.

Statement of Facts

The centerpiece of the area proposed for incorporation is the Pocono International Raceway ("Raceway"), located in Tunkhannock Township, Monroe County,

Pennsylvania. The Raceway has a total of 49,000 grandstand seats, 10,000 of which were only recently added. Located in the heart of the Pocono Mountains, a nationally known resort area, it is host to two Winston Cup NASCAR stock car races annually.

The Raceway has needs and interests separate and distinct from the remaining portions of Tunkhannock Township, which is essentially a rural community. The periods of intense usage and influx of tourists throughout the year require planning, services and special attention that the Township does not and cannot provide. Indeed, out of the approximately $165,000 in taxes the Township collects from Raceway activities each year, it spends only about $8,000 for the services it provides to the Raceway.

In its Petition, the Raceway, along with Joseph R. Mattioli and his wife, Rose, who are the majority shareholders of the Raceway Corporation and residential owners of property within the proposed borough, sought borough incorporation of some 1,026 acres, which included the Raceway facilities. As stated in their Petition, the Mattiolis and the Raceway wished "to develop a planned community in the proposed borough, which will include not only the already existing International Raceway, but also residential dwellings, commercial developments, a planned recreational area and convention center, along with water, sewage and road systems to accommodate those personal and commercial interests." They filed the Petition, confident that they could meet all of the requirements of existing law, which mandated that, once those requirements were met, the question of incorporation *shall be* placed on the ballot. See 53 P.S. § 45202(d). Unfortunately, although the trial court specifically found

that, indeed, all of the legal requirements had been met, it rejected the Petition because the Petitioners were related to one another, the existence of this "family relationship" obviously weighing heavily on its mind.

Procedural History

Subsequent to the filing of the Petition for Incorporation, exceptions were filed by Tunkhannock Township; the Tunkhannock Township Residents Committee; Charlotte, James G. and James R. Davenport, individuals who reside in Tunkhannock Township; and certain residents whose property was not included within the proposed borough, but whose property abuts it (the "Cortright Road residents"). By Opinion and Order dated September 1, 1993, the trial Judge denied all exceptions, paving the way for the incorporation process to continue. (App. A52-60).

On December 18, 1992, while the incorporation proceedings were pending, the Pennsylvania legislature enacted Act 181 of 1992, amending Pennsylvania's law relating to borough incorporation. (App. A65). Whereas the prior law set forth no minimum requirement for the number of residents within a proposed borough, Act 181 established, for the first time, a requirement that the proposed borough have at least *500* residents as a prerequisite to the filing of a petition for incorporation. In counties of the fifth class, however, petitions presented before the effective date of Act 181, December 18, 1992, were excluded from the Act's coverage. As Monroe County is a fifth class county, and as the Petition for

Incorporation had been filed on October 5, 1992, *no minimum resident requirement is applicable to the Petition in this case.*

In accordance with the procedure for incorporation of boroughs, the Court appointed a Borough Advisory Committee ("Committee") to render advice and findings of fact relating to whether the proposed borough should be incorporated. The Committee consisted of two residents of the proposed borough, two residents of Tunkhannock Township and a resident of Monroe County who was not a resident of either the proposed borough or Township. The Committee held hearings for an entire week from October 4, 1993 through October 8, 1993, and approximately 1,000 pages of testimony were transcribed.

On November 18, 1993, the Committee, with two members dissenting, recommended to the Court that the Borough of the Pocono Raceway be incorporated. However, the Committee members were unanimous in concluding that *each and every statutory and case law criterion they were directed to consider had been satisfied.*

Following the filing of the report of the Borough Advisory Committee, the trial court held a final hearing on December 1, 1993 to determine whether the issue of the borough incorporation should be put to a vote of those residing within the proposed borough in accordance with the applicable borough incorporation statute, 53 P.S. § 45202(d). (App. A63). As noted, the Borough Code provided that once the Court finds that "the conditions prescribed by this section have been complied with, [the Court] *shall* certify the question [of incorporation] to the board of elections of the county for a referendum vote

of the residents of the proposed borough." 53 P.S. § 45202(d).

In its Opinion of December 20, 1993, the Court found that all of the statutory and case law criteria had been met. (December 20, 1993, Opinion, p. 9, App. A40-48). However, despite its own finding that the proposed borough had "common interests and needs that can best be served by a borough government," the Court denied incorporation.

Without absolutely any support in the record, the Court opined that since most of the residents of the proposed borough were members of the Mattioli "family," the "family" would thus have control of "all the governmental powers." The Court noted that "[t]his concentration of political power among a small family group has great potential for misconduct." (December 20, 1993, Opinion, p. 13, App. A15). No evidence of any potential for misconduct was cited, and none exists. *In fact, this issue was not raised in any of the proceedings.*

On December 29, 1993, the Petitioners filed Exceptions and Motions for Post-Trial Relief and for Reconsideration, and argument was held on January 11, 1994. Petitioners raised the constitutional arguments regarding the trial court's denial of equal protection and due process in their Exceptions and Motions for Post-Trial Relief and for Reconsideration. (App. A34). Although all of the objectors argued that the Court should find against the Petitioners and not reconsider its decision, *none of them took issue with the Court's findings of fact.* By Opinion and Order dated January 19, 1994, the trial court denied the post-trial motions, again making it clear that its sole reason for denying the Petition was its concern with

"potential problems" created by "family boroughs." (January 19, 1994, Opinion, p. 4, App. A32). The trial court found that neither the Petitioners' equal protection nor their due process rights had been violated.

Petitioners appealed to the Pennsylvania Commonwealth Court, again asserting that the trial court had denied them equal protection under the law and had violated their due process rights. (Appellants' Brief, App. A23-28.) The Commonwealth Court affirmed the lower court's order and, with respect to the constitutional issues raised, the Commonwealth Court stated only that the "trial court's actions were neither discriminatory nor violative of [Petitioners'] due process rights." *In re Incorporation of Borough of Pocono Raceway*, ___ Pa. Commw. ___, 646 A.2d 6 (1994) (App. A15). Petitioners then filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, raising, *inter alia*, the issues of due process and equal protection. (Petition, App. A27-21.) On November 17, 1994, the Pennsylvania Supreme Court denied the Petition for Allowance of Appeal. 1994 Pa. Lexis 667 (Pa. 1994) (App. A16).

This Petition followed.

REASONS FOR ALLOWING THE WRIT

A. The decisions of the lower Courts are a violation of the equal protection guarantees of the United States and Pennsylvania Constitutions.

The Commonwealth of Pennsylvania has a long history of permitting the incorporation of family-run boroughs for

the purpose, *inter alia*, of fostering residential, recreational and commercial development. Incorporation of such boroughs was granted in the cases of *In re Incorporation of Borough of Seven Springs*, No. 4 September Session 1963, Somerset County, *In re Incorporation of Borough of Seven Fields*, 75 Pa. Commw. 334, 462 A.2d 865 (1983), and *In re Incorporation of Borough of New Morgan*, 527 Pa. 226, 590 A.2d 274 (1991), *cert. denied*, 112 S. Ct. 179 (1991). Indeed, as early as 1889, the Supreme Court of Pennsylvania stated:

> The law contemplates the formation of boroughs out of villages and adjacent territory; and when the people in the village and its adjacent territory, with almost entire unanimity, ask incorporation, it would seem to be a willful disregard of the intention of the legislature in its borough legislation, and the rights of the people thereunder, to refuse them borough privileges.

Incorporation of Edgewood Borough, 130 Pa. 348, 13 A. 646 (1889). Clearly the Mattioli family is similarly situated to the petitioners in the various cases cited. Nevertheless, the Court of Common Pleas of Monroe County refused to continue this tradition and, instead, created a new classification of persons not entitled to form a borough, to wit, the family.

The Equal Protection Clause of the United States Constitution is directed at every form of state action – legislative, executive and *judicial*. *Shelly v. Kraemer*, 334 U.S. 1 (1968). Since the seminal case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Equal Protection Clause has been

interpreted to proscribe not only the enactment of discriminatory laws, but also the discriminatory enforcement of laws which are fair on their face. As this Court stated in *Yick Wo*:

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room *for the play in action of purely personal and arbitrary power.*

Id. at 226 (emphasis added). The *Yick Wo* Court went on to quote the "language of the Massachusetts Bill of Rights, that the government . . . 'may be a government of laws and not of men.' " *Id.* at 226. Indeed, it has long been held that "the unlawful administration by state officers of a state statute fair on its face, resulting in unequal application to those who are entitled to be treated alike," is a violation of equal protection if purposeful discrimination is shown. *Snowden v. Hughes,* 321 U.S. 1 (1944). Such discrimination may be shown on the face of the action taken itself. *Id.* at 8.

In this case, the Petitioners do not attack the statute regulating borough incorporation. What they do contest is judicially created "legislation" which has the same effect as a statute. It is clear that, were a statute to provide that any group of persons, *except those related to one another,* could petition for the formation of a borough, such a law could not pass constitutional muster. The courts' rulings here have exactly the same effect.

Although the Pennsylvania legislature did not prohibit families from applying for the incorporation of a

borough, the trial judge engrafted his own classification onto the Act, that is, his prejudice against a "family-run" borough. Thus, since the Pennsylvania courts denied Petitioners' application solely on the basis that they were a "family," they have established a classification subject to scrutiny under the equal protection clause.

In *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) this Court held:

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria *wholly unrelated to the objective of that statute.*
>
> * * *
>
> *A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."*

Id. at 75-76. (Emphasis added) (citations omitted).

In *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973), this Court struck down an unrelated-person provision of the Food Stamp Act because it created an irrational classification in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. In arriving at this decision, Justice Brennan

cited the "government's wholly unsubstantiated assumptions concerning the differences between 'related' and 'unrelated' households . . . " *Id.* at 535. In the case at bar, the Pennsylvania courts have legislated into the Borough Code an identical irrelevant and irrational classification without any substantiation in the record; a classification which draws an irrational distinction between "family-created" boroughs and "non-family-created" boroughs.

In this case, the traditional standard of review under the Equal Protection Clause requires a showing that this state action had no rational relationship to legitimate state purposes.[1] *San Antonio Independent School District v. Rodrigues,* 411 U.S. 1, *reh. den.,* 411 U.S. 959 (1973).

The question presented by this case is whether the exclusion of "family-run" boroughs bears a rational relationship to a state objective that is sought to be advanced; *i.e.,* fostering the creation of boroughs. As noted above, the Pennsylvania Supreme Court early on recognized its Legislature's intention to encourage the formation of boroughs. *Edgewood Borough, supra.* This intention was most recently underscored by the 1992 amendments to the Pennsylvania Borough Code, which, while placing minimum requirements for the number of *residents* of new boroughs, still recognize the right of one or more landowners to apply for incorporation.

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[1] While petitioners recognize that they are not necessarily members of a suspect class, it is clear that, at least when it comes to the formation of boroughs, the Courts of Pennsylvania have made families a suspect class.

The development of the equal protection doctrine of the United States Constitution since this Court's decision in *Yick Wo, supra,* has usually dealt with legislative, or quasi-legislative action. Indeed, this Court has traditionally given deference to the action taken by state legislatures. Here, however, the Court is presented with the unique example of a single judge creating his own legislation based on his purely personal beliefs and assumptions. Indeed, it would be impossible for this Court to determine whether a rational basis existed for the denial of equal protection to Petitioners, since no basis whatsoever is given for the action taken by the trial judge, other than his wholly unsubstantiated assumption that a "great potential for misconduct" exists when a "family" becomes involved.

Without explanation, the trial court denied *this* Petition on the basis that the proposed borough would be a "family" borough, thus seizing upon an issue *never raised by those who filed objections to the Petition,* concluding that if the proposed founding fathers of a borough are related to one another (i.e., constitute a "family"), a "great potential for misconduct" exists. (December 20, 1993, Opinion, p. 13, App. A50). The trial court's decision is a flagrant display of judicial activism. On its face, the discrimination is purposeful and violates these Petitioners' constitutional rights. Since no rational basis for the judge's action exists, and since Petitioners have been denied the same benefit of the laws of Pennsylvania as those similarly situated, the Petitioners have clearly been denied equal protection of the laws under the Fourteenth Amendment.

B. The decisions of the lower Courts in retroactively applying new law and in creating a "new" prohibition against family boroughs violate due process guarantees of the United States and Pennsylvania Constitutions.

Petitioners' due process guarantees have also been violated. In this case, the Pennsylvania legislature, in enacting Act 181 (which set a minimum requirement of 500 residents for any new borough), specifically excluded the instant Petition from any such requirement. Nonetheless, the trial court in effect *applied* a minimum resident requirement by expressing a concern that too few residents existed in the borough as proposed; this, despite his finding that there were sufficient residents to form a borough government, and that additional residential development had been provided for. This is a startling retroactive application of a change in the law; no minimum number of residents had ever been required in borough incorporation until this case.[2]

In *Chevron Oil v. Husen*, 404 U.S. 97 (1971), this Court set forth the test for deciding whether a decision (in this case, a statutory amendment) should be retroactively applied:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied

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[2] Although both the trial court and the Commonwealth Court stated that they were not relying on the minimum residency requirement amendment, it is clear from the language of those opinions that the amendment played a significant role in their deliberations.

> nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., *Hanover Shoe v. United Shoe Machinery Corp.*, supra, at 496, 20 L Ed 2d at 1243, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen v. State Board of Elections*, supra, at 572, 22 L Ed 2d at 20. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, supra, at 629, 14 L Ed 2d at 608. Finally we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma*, supra, at 706, 23 L Ed 2d at 652.

Chevron Oil v. Husen, at 106.

In applying the above three factors to the instant case, the first is satisfied, since the new statute established "new principles," overruling clear past precedent on which the Petitioners relied. Relying on *New Morgan, Seven Fields, Seven Springs, In re Incorporation of Green Hills*, 59 Washington Cty. R. 75 (1978), and *In re Incorporation of Borough of Two Ponds*, 87 Pa. Commw. 324, 489 A.2d 939 (1985), Petitioners went forward with drafting plans for additional residential and commercial development, hiring surveyors, and ultimately filing their Petition for Borough Incorporation. Prior to the decision in the case at issue *all existing* decisional precedent and the statutory law permitted borough incorporations without

regard to the number of residents *or* whether the incorporators were related to each other. (*See New Morgan, Seven Fields, Seven Springs, Green Hills,* and *Two Ponds.*)

The next step is to "weigh the merits" of applying a new law retroactively by looking to "prior history of the rule in question, its purpose and effect and whether retrospective operation will further or retard its operation." In the instant case the new "rule" has no prior history; instead the new "rule" (i.e., the 1992 Amendment to the Borough Code), specifically precludes its application to the very petition for borough incorporation filed on behalf of Petitioners.

Finally, the hardship involved should these judicially created "minimum resident" and "unrelated resident" requirements be applied here is plain. The Petitioners have invested hundreds of thousands of dollars in the preparation of development plans, and for attorneys' and experts' fees. One wonders why they were put to this great expense, given that the basis for the trial court's rationale in denying the Petition was, or should have been, apparent to the Court from the outset. In short, the trial court could have denied Petitioners' application for incorporation immediately after its filing because, at that time, the Court knew that the proposed borough had eleven residents, most of whom were members of the Mattioli family.

In *Bradley v. Richmond School Board,* 416 U.S. 696 (1971), Mr. Justice Blackmun wrote:

> We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, *unless doing so*

> *would result in manifest injustice or there is statutory direction or legislative history to the contrary.*

Id. at 488 (emphasis added).

In the instant case the clear and unequivocal statutory direction states that the 1992 Amendment to the Borough Code *shall not* apply to the Petitioners' application for borough incorporation. Therefore, applying the Amendment to the case at bar undeniably results in manifest injustice heretofore unseen in cases arising under the existing Pennsylvania Borough Incorporation law. In *Bradley, supra,* this Court appropriately reviewed the legislative history of the statute in question and determined in fact that the new statute should be retroactively applied to enable the plaintiffs to obtain attorneys' fees in a prior lawsuit. Additionally, the *Bradley* Court stated that "we perceive no . . . threat of manifest injustice present on this case . . . ." *Id.* at 491. Conversely, in the case now before this Court, the statute precludes the application of the Amendment to the proceedings here, *and* as stated above, Petitioners have suffered a manifest injustice as a result of the trial court's *sub silentio* application of the Amendment.

Not only did the trial court inappropriately and retroactively apply the 1992 Borough Code Amendment requiring a minimum number of residents, it also effectively *added* a new prohibition to the borough incorporation law. In effect, the trial court held that (notwithstanding the clear language of the statute *directing* the court to conduct a referendum if all legal requirements had been satisfied), it would not permit creation of "family" boroughs. This holding, in light of the known

and well established case law, was in direct violation of the Petitioners' due process rights. See *New Morgan, supra* and *Seven Springs, supra,* where Pennsylvania boroughs were incorporated by a small group of related residents.

This Court has consistently respected and upheld the sanctity of the family and family associations. In *Moore v. East Cleveland,* 431 U.S. 494 (1977), this Court stated:

> This Court has long recognized that freedom of personal choice in matters of marriage and family as one of the liberties protected by the Due Process Clause of the Fourteenth Amendment . . . when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the unchallenged regulation.

Id. at 499 (citations omitted).

The trial court failed to establish exactly what governmental interests it hoped to advance by prohibiting families from borough incorporation. Instead, in its arbitrary ruling it denied incorporation on the basis that family boroughs create a "great potential for misconduct." (December 20, 1993, Opinion, p. 13, App. A50). There is simply no evidence of record which even suggests that "family boroughs create a great potential for misconduct." Moreover, the trial court failed to identify one shred of evidence which explains its rationale regarding families in general, and the Mattioli family, in particular. While *Moore* involved an ordinance requiring that only a strictly defined "nuclear family" be permitted to live in a single housekeeping unit, here the trial court's

refusal to allow the incorporation petition to go forward is tantamount to governmental intrusion affecting the Mattiolis' choice to associate as a family in creating a new borough.

In *Moore v. East Cleveland, supra,* Justice Powell explained thoroughly why due process protections should be considered fully when reviewing state action which affects the family:

> To be sure, these cases did not expressly consider the family relationship presented here. They were immediately concerned with freedom of choice with respect to childbearing, e.g., LaFleur, Roe v. Wade, Griswold, supra, or with the rights of parents to the custody and companionship of their own children, Stanley v. Illinois, supra, or with traditional parental authority in matters of child rearing and education. Yoder, Ginsberg, Pierce, Meyer, supra. *But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.*

Understanding those reasons requires careful attention to this Court's function under the Due Process Clause. Mr. Justice Harlan described it eloquently:

> "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between

> that liberty and the demands of organized society."

Id. at 430 (emphasis added). Petitioners urge this Court to recognize that due process has been violated in this case because their right to go forward with the borough incorporation was denied on the sole basis that they were members of the same family.

Simply put, the Petitioners do not argue that, because they are a "family," they are entitled to form a borough. What they do argue is that they should not be prohibited from forming one solely because they are a family.

Finally, it has long been recognized that due process involves a right to an explanation as to why a court did what it did. As stated by this Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970):

> Finally, the decision-maker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing. *Ohio Bell Tel. Co. v. PUC*, 301 US 292, 81 L Ed 1093, 57 S Ct 724 (1937); *United States v. Abilene & S.R. Co.*, 265 US 274, 288-289, 68 L Ed 1016, 1022, 1023, 44 S Ct 565 (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. *Wichita R. & Light Co. v. PUC*, 260 US 48, 57-59, 67 L Ed 124, 129, 130, 43 S Ct 51 (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential. Cf. *In re Murchison*, 349 U.S. 133 (1955); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

Id. at 271. The trial court's opinion establishes that the Petitioners did not have the benefit of an impartial decision maker. In this case, no evidence is cited, and no support is provided to support the court's fear of misconduct or "potential for abuse" by the Mattioli family. There is none. Due process demands such explanation, particularly when one considers that the trial court found that Petitioners met each and every statutory and case law requirement. Given that the Mattiolis are highly regarded, civic-minded persons of impeccable reputation, the decision here resulted in a totally undeserved reflection upon their reputation, character and integrity.

Petitioners respectfully request that this Honorable Court grant their Petition for Certiorari.

CONCLUSION

For all of the foregoing reasons, the Petitioners respectfully request that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: INCORPORATION OF BOROUGH OF POCONO RACEWAY	:	NO. 155 C.D. 1994 ARGUED: May 12, 1994
POCONO INTERNATIONAL RACEWAY, INC., JOSEPH R. MATTIOLI and ROSE MATTIOLI, Appellants	:	

BEFORE: HONORABLE DAVID W. CRAIG, President Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE GEORGE T. KELTON, Senior Judge

OPINION BY JUDGE SMITH FILED: July 13, 1994

Pocono International Raceway, Inc. (Pocono) and Joseph R. and Rose Mattioli (collectively Appellants) appeal from the January 19, 1994 order of the Court of Common Pleas of Monroe County that denied Appellants' exceptions and motions for post-trial relief from the trial court's December 20, 1993 order denying Appellants' petition for incorporation of the Borough of Pocono Raceway (Borough). The broad issue raised for this Court's review is whether the trial court erred or abused its discretion in denying the petition for incorporation by considering factors beyond those outlined in Section 202

of The Borough Code, Act of February 1, 1966, P.L. (1965) 1656, *as amended*, 53 P.S. § 45202.

I

(a)

On October 5, 1992, Appellants filed a petition for incorporation of the Borough, which is currently located within Tunkhannock Township (Township). Pocono is owned and operated by the Mattioli family and is host to NASCAR stock car races in the summer months. The area proposed for incorporation consists of 1,026 acres of land which is gently rolling, well drained, and physically well suited for development. The predominant use of land is devoted to the race track and its attendant operations. Several homes already exist within the area of the proposed Borough. Appellants also presented a plan for development of an area of the proposed Borough which is to contain 254 lots for single-family, detached homes on 130 acres. The proposed Borough is predominantly surrounded by land which is either commercially zoned, commercially undevelopable, publicly owned, or wetlands.

The petition alleged that Appellants constituted a majority of the freeholders residing within the proposed Borough. Timely exceptions to the petition were filed by the Township; Charlotte Davenport, James G. Davenport, James R. Davenport; the Tunkhannock Township Residents' Committee; and the "dirt road off of Cortright field residents" (Cortright Road residents). The exceptions asserted, inter alia, that the petition disclosed on its face the existence of eight freeholders within the limits of the

proposed Borough; Pocono and the Mattiolis were not a majority of the freeholders in the proposed Borough; the petition should be dismissed because it failed to obtain the signatures of the majority of the freeholders residing within the limits of the proposed Borough pursuant to Section 202 of the Borough Code; and Appellants intentionally excluded an area forming a "peninsula" within the boundaries of the proposed Borough consisting of twenty-three freeholders (the Cortright Road residents), which indicated Appellants' desire to manipulate the number of freeholders and thus avoid the mandatory requirements of Section 202.

On September 1, 1993, the trial court dismissed the exceptions as to the number and sufficiency of the signatures on the petition and reserved ruling on the geographic integrity issue. Pursuant to Section 202 of the Borough Code, the trial court appointed a Borough advisory Committee (Committee),[1] which by a three to two vote on November 18, 1993 recommended in favor of Borough incorporation. The Committee found that the proposed Borough met the statutory criteria set forth in the Borough Code and that the proposed Borough is a harmonious whole with common interests and needs that can best be served by a borough government. The Committee concluded that geographic integrity as it related to

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[1] The Committee shall make findings and conclusions regarding the desirability of incorporation and must consist of two residents of the proposed borough, two residents of the township outside of the proposed borough, and one resident of the county not residing in either area who shall serve as Committee chairperson.

the Cortright Road residents would not isolate those residents from the Township. After receiving the Committee's report and conducting a further hearing, the trial court on December 20, 1993 dismissed the Petition for incorporation.

At the outset, Section 202(c) of the Borough Code provides:

> (c) Such committee shall, within sixty days of its creation, advise the court in relation to the establishment of the proposed borough. In particular, the committee shall render expert advice and findings of fact relating to the *desirability* of such an incorporation, *including, but not limited to, advice as to:*
>
> (1) the proposed borough's ability to obtain or provide adequate and reasonable community support services such as police protection, fire protection and other appropriate community facility services;
>
> (2) the existing and potential commercial, residential and industrial development of the proposed borough; and
>
> (3) the financial or tax effect on the proposed borough and existing governmental unit or units. [Emphasis added.]

The trial court adopted the Committee's findings that the proposed Borough has the ability to provide police protection, fire protection, and other appropriate community facility services; existing and potential development was consistent with the desirability of the proposed Borough and it could provide finances to support itself; and the incorporation would have a minimal tax impact on the

tax revenues of the Township, providing that the Township would realign its tax structure.

In addition to the three factors set forth in the statute, the Committee determined that the proposed incorporated area is a harmonious whole with common interests and problems which can be properly served by a borough government. As well, the Committee concluded that the geographic integrity as it relates to the Cortright Road residents is not presently a negative factor and would not present any problems in the future. The trial court also adopted both of these findings. Nevertheless, the trial court recognized that there may exist some problems with the right-of-way on Cortright Road for residents living there and the residents would have no control over the zoning in the proposed Borough, which surrounds their properties. The trial court noted that if the Borough were incorporated, zoning would be determined by the Borough, which would be operating for its own interests and may not be responsive to the Cortright Road residents.

Moreover, the trial court expressed reservations regarding the number of the Borough's total residents, approximately eleven, and the problems inherent in allowing one family control of an entire borough, and indicated that Section 201 of the Borough Code, 53 P.S. § 45201, was recently amended by the legislature and permits incorporation of an area having a population of at least 500 residents.[2] The trial court opined that this

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[2] *See* Act of December 18, 1992. P.L. 1650 (Act 181). Under Section 3 of Act 181, the minimum resident requirement applies

legislation evidenced a trend away from the incorporation of boroughs with small populations as has been allowed in the past, but specifically recognized that the new minimum population requirement does not apply to this case.

The court pointed out that the petitioners were Pocono and the Mattiolis and, in addition, most of the residents of the proposed Borough are members of the Mattioli family. In its opinion, the trial court stated:

> This incorporation, if approved, would give one family complete governmental control. The family would have control of all of the governmental powers, including physical, economic and political. . . . This concentration of political power among a small family group has great potential for misconduct. . . . The proposed borough casts shadows of an old company town in modern dress.

Opinion, pp. 13-14. Citing *Glen Mills Schools Appeal,* 125 Pa. Commonwealth Ct. 604, 558 A.2d 592, *appeals denied,* 523 Pa. 651, 652, 567 A.2d 654, 655 (1989), the trial court also noted that this Court has recognized the problems of borough incorporation by one landowner and the potential for exclusion and exploitation and, stating that this was "the true issue," denied the petition for incorporation. Appellants' exceptions and motions for post trial

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to applications and petitions presented on or after March 25, 1992, except in counties of the fifth class, where the act shall apply to applications and petitions presented on or after the effective date of the act.

relief and reconsideration were thereafter denied on January 19, 1994, and Appellants appealed to this Court.[3]

II

Before addressing Appellants' main arguments, this Court must resolve a jurisdictional issue raised by Appellees, the Township, the Cortright Road residents, and the Tunkhannock Township Residents' Committee, who argue that the trial court lacked subject-matter jurisdiction because the petition for incorporation failed to comply with the requirements of Section 202(a) of the Borough Code, 53 P.S. § 45202(a). That section provides in relevant part:

> (a) The application for incorporation shall be by a petition signed by a majority of the freeholders residing within the limits of the proposed borough. . . . The signatures must be secured within three months immediately preceding the presentation thereof to the court. Such petition shall be subscribed by and sworn to by at least one of the signers. The number of

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[3] This Court's scope of review is to affirm the trial court's findings of fact unless they are not based upon competent evidence, or unless the court's conclusions of law are not reasonably based upon its findings of fact. *In re Borough of New Morgan*, 527 Pa. 226, 590 A.2d 274, *cert. denied*, ___ U.S. ___, 112 S. Ct. 179 (1991). The question of incorporation is addressed mainly to the discretion of the trial court, yet it is not beyond this Court's appellate scope of review to decide whether the trial court has committed an abuse of discretion. *Canterbury Village, Inc. Appeal*, 75 Pa. Commonwealth Ct. 334, 462 A.2d 865 (1983).

> signers required to the petition shall be ascertained as of the date the petition was presented to court.

Appellees note that eight freeholders are identified in the petition for incorporation and out of those eight only two, Pocono and the Mattiolis, have signed the petition. Section 202(a) however clearly requires signatures of a majority of the *resident* freeholders of the proposed Borough. Therefore, the issue is whether Pocono and the Mattiolis constitute a majority of the resident freeholders of the proposed Borough.

Appellants contend that Appellees' jurisdictional claim, which was rejected by the trial court, has been waived before this Court because Appellees filed no cross-appeal from the trial court's decision. Appellants rely upon *Collier Township v. Robinson Township*, 25 Pa. Commonwealth Ct. 227, 360 A.2d 839 (1976), where this Court held that although it is indisputable that objections as to lack of subject-matter jurisdiction may be taken at any stage in a judicial proceeding, the objection must be raised at the first opportunity or within a reasonable time, otherwise it is waived. Appellees sub judice raised the jurisdictional question before the trial court at the first opportunity.

A court may raise the issue of its subject-matter jurisdiction on its own initiative at any stage of a proceeding; further, such jurisdiction cannot be obtained by consent of the parties or by waiver or estoppel. *Appeal of Borough of Valley-Hi*, 54 Pa. Commonwealth Ct. 53, 420 A.2d 15 (1980). Moreover, the jurisdictional issue here does not involve merely procedural or technical errors on the face of the petition, in contrast to *Valley-Hi* and *Appeal*

of Township of Ligonier, 59 Pa. Commonwealth Ct. 532, 430 A.2d 389 (1981), relied upon by Appellants. Therefore, the jurisdictional issues raised by Appellees is not waivable and must be addressed by this Court.[4]

Appellees contend that John A. and Joann McElroy (the McElroys), who own commercially zoned property within the proposed Borough, are resident freeholders. Appellees argue that the signatures on the petition of two of the resident freeholders failed to constitute a majority of the four resident freeholders within the proposed Borough. Extensive and undisputed evidence was presented regarding the McElroys' use of their property which showed that the only structures on the property are billboards owned by another company that were on the property when the McElroys purchased it. The McElroys receive rent for the billboards and on several occasions have allowed vendors to operate on their property. Under these circumstances, the trial court properly concluded that the McElroys have no substantial contact with the

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[4] Appellees argue that the trial court erred in its conclusions that the proposed borough exhibited geographic integrity and constituted a harmonious whole; and that the impact of the proposed incorporation on tax revenues of the Township would be minimal. It is well settled that without taking a cross-appeal, an appellee cannot raise issues decided adversely to it. *Appeal of Pesante*, 82 Pa. Commonwealth Ct. 242, 476 A.2d 474 (1984). Appellees filed no cross-appeal on these issues. Consequently, the only issues properly before this Court, other than the jurisdictional question, are those that Appellants have raised. The Tunkhannock Township Residents' Committee also asserts that the trial court violated its due process rights in formulating an accelerated hearing schedule. The trial court's determination in this regard was not appealed and is likewise waived.

property sufficient to allow them to be considered resident freeholders. It was undisputed that Mattco, Inc. is a resident freeholder and did not sign the petition. However, because Appellants constituted a majority of the resident freeholders in the proposed Borough, the trial court possessed subject-matter jurisdiction over the case.

III

The gravamen of Appellants' appeal is that the trial court erred in refusing to grant the petition for incorporation once it found that all statutory and case law criteria were satisfied. The trial court is vested with discretion in determining whether the conditions prescribed in Section 202(c) of the Borough Code have been complied with, and the court's decision must be upheld absent a finding that its discretion was abused. *Borough of Bridgewater Petition,* 87 Pa. Commonwealth Ct. 599, 488 A.2d 374 (1985). Because of the vesting of discretion in the trial court, courts have rejected the contention that a trial court must grant incorporation if the statutory requirements are met and there are no technical objections. *Blandon Borough Incorporation Case,* 182 Pa. Superior Ct. 304, 126 A.2d 506 (1956).

An advisory committee may properly consider factors other than those set forth in the Borough Code, and the trial court that reviews the committee's findings and conclusions may evaluate the petition for incorporation on the basis of those factors and other considerations which the Code does not specify. *Glen Mills Schools.* In addition to the three statutory criteria set forth in the Borough Code, the trial court must determine whether

the proposed borough constitutes a harmonious whole with common interests and needs that can best be served by a borough government, *In re Borough of New Morgan*, 527 Pa. 226, 590 A.2d 274, *cert. denied*, ___ U.S. ___, 112 S. Ct. 179 (1991); and whether borough incorporation would have an undue geographical impact on the existing township's territorial integrity. *Glen Mills Schools.* Under Appellants' analysis, satisfaction of these criteria would automatically compel the trial court to grant the petition for incorporation. Such a position misperceives the nature of the trial court's discretion when considering the desirability of a proposed borough incorporation.

Pennsylvania's appellate courts have made it clear that the proper analysis of borough incorporation petitions requires the court to look beyond the three statutory provisions of Section 202(c) of the Borough Code.[5] In *In re Incorporation of the Borough of Chilton*, ___ Pa. Commonwealth Ct. ___, ___ A.2d. ___ (Nos. 236 C.D. 1993, 282 C.D. 1993, filed *July 13*, 1994, this Court concluded that the trial court erred in limiting its analysis of the desirability of a proposed borough incorporation to the three statutory criteria and failing to consider other relevant factors. Specifically, the trial court in *Chilton* rejected as among relevant considerations the factor of whether an incorporation was against the public interest based upon the unavailability of any low income housing, thus violating the "fair share principle," which requires a local political

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[5] *See Borough of New Morgan; In re Borough of Bear Creek Village*, 150 Pa. Commonwealth Ct. 595, 616 A.2d 111 (1992), *appeal denied*, 533 Pa. 664, 625 A.2d 1196 (1993); *Glen Mills Schools; Borough of Bridgewater; Canterbury Village.*

unit to plan for and provide land use regulations meeting the legitimate needs of all categories of people who may desire to live within its boundaries. *See Surrick v. Zoning Hearing Board of Upper Providence*, 476 Pa. 182, 382 A.2d 105 (1977). Applied to the present matter, *Chilton* illustrates that the trial court properly exercised its discretion in considering factors beyond those directly addressed by the Committee and in addition to those required by law to be addressed.

Appellants nevertheless contend that the trial court's denial of the petition on the basis that there are two [sic] few residents and that this "family borough" has great potential for misconduct, constitutes an error of law, and argue that the trial court's consideration of Act 181 amounted to an unconstitutional retroactive application of the Act's minimum resident requirement. The trial court however directly acknowledged that the Act 181 minimum resident requirement was not applicable to Appellants' petition. Although the courts have in the past granted petitions for incorporation where the proposed boroughs contained few residents at the outset,[6] this Court held in *Chilton* that it is nonetheless important to note the legislative change. Act 181 legislation represents evidence of a trend away from the incorporation of boroughs with few residents as has been allowed in the past. Consideration of this point is particularly relevant where, as here, the petitioners have not embarked on a course of development nor made substantial contributions to

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[6] *See Bear Creek Village, New Morgan,* and *Canterbury Village.*

commencement of the development and their proposed plans are merely speculative at best.[7]

Long before Appellants filed their petition for incorporation, this Court in *Glen Mills Schools* firmly established that among the relevant factors affecting desirability of incorporation is a case where one landowners wants to separate and govern itself, which left this Court to ponder –

> [H]ow far would it go: colleges, universities, sundry institutions, corporations, larger land owners, perhaps smaller too, would break-off at will from Townships and into multi-separate boroughs. Each borough going its own way to create a mix of perhaps harmonious, perhaps antagonistic, but incongruous zoning or development patterns, and as well conflicting and often inconsistent services. The potential for exclusion, exploitation and overreaching becomes real and ever present.
>
> Suppose [petitioner] sold its property and moved, one whole Borough would then be bought, and available for unbridled and unrestricted control except as the Borough Code might provide.
>
> . . . .
>
> In the end we have not come so far in our evolving history to now go backward toward creating what would ultimately become feudal-

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[7] Contrast *Canterbury Village* where the petitioners had already installed complete road, water, and sewer systems, including a sewage treatment plant, and had executed contracts for fire, police, and garbage collection.

> like estates. This is certainly not the acceptable or reasonable basis and approach to local government.

Id., 125 Pa. Commonwealth Ct. at 610, 558 A.2d at 595. It is precisely this concern that was articulated by the trial court sub judice. In addition, the trial court expressed the related concern that the Cortright Road residents, whose thin isolated strip of land would be virtually surrounded by the proposed Borough, would have no control over zoning and proposed development in the Borough.[8]

It is especially appropriate to allow the trial courts latitude in evaluating factors whose relevancy has been established by the evidence presented because the trial court judges, "having personal knowledge of the territory sought to be incorporated and of the witnesses who testify as to the facts, are more likely to arrive at a correct conclusion, as to the municipal needs, than the members of a tribunal sitting at a distance from the scene of controversy, who are without full information as to local conditions." *Blandon Borough*, 182 Pa. Superior Ct. at 307-308, 126 A.2d at 508. The trial court's decision in this instance was not, as Appellants contend, based on speculation and

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[8] Appellants incorrectly state that in *Two Ponds, Inc. Appeal*, 87 Pa. Commonwealth Ct. 324, 489 A.2d 939 (1985), this Court held that a developer could petition for incorporation even though there were only four tenants living in the proposed borough. In that case however this Court vacated the trial court order for failure to establish an advisory committee as mandated by the Borough Code, and never reached the merits of the petition.

mere conjecture. Rather, it was based upon valid, considerable factors previously articulated by this Court. Contrary to Appellants' assertions, the trial court's actions were neither discriminatory nor violative of Appellants' due process rights. Moreover, the trial court clearly stated the reasons for its determination and the evidence on which it relied as the basis for its decision. Accordingly, the order of the trial court is affirmed.

/s/ Doris A. Smith, J.
DORIS A. SMITH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: INCORPORATION OF BOROUGH OF POCONO RACEWAY	:	NO. 155 C.D. 1994
POCONO INTERNATIONAL RACEWAY, INC., JOSEPH R. MATTIOLI and ROSE MATTIOLI, Appellants	:	

ORDER

AND NOW, THIS 13th day of July , 1994, the order of the Court of Common Pleas of Monroe County is affirmed.

/s/ Doris A. Smith, J.
DORIS A. SMITH, Judge

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE: INCORPORATION OF BOROUGH OF POCONO RACEWAY POCONO INTERNATIONAL RACEWAY, INC., JOSEPH R. MATTIOLI and ROSE MATTIOLI, Petitioners	:	No. 369 Middle District Allocatur Docket 1994 Petition for Allowance of Appeal from the Commonwealth Court

ORDER

PER CURIAM

AND NOW, this 17th day of November, 1994, the Petition for Allowance of Appeal from the Commonwealth Court is hereby denied.

Mr. Justice Montemuro is sitting by designation.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. ___ M.D. Allocatur Docket 1994

IN RE: INCORPORATION OF THE BOROUGH OF POCONO RACEWAY

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from the Order of the Commonwealth Court at No. 155 C.D. 1994 Dated July 13, 1994 Affirming the Orders of the Court of Common Pleas of Monroe County Dated December 20, 1993 and January 19, 1994 at No. 175 Misc. Civil 1992

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* * *

E. The decision of the lower Court is a violation of the equal protection guarantees of the United States and Pennsylvania Constitutions.

As stated by the Pennsylvania Superior Court in *Commonwealth v. Stinnett*, 356 Pa. Super. 83, 514 A.2d 154 (1986):

> The Equal Protection Clause in the United States Constitution is directed at every form of state action – legislative, executive, and *judicial*, *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). It not only proscribes the enactment of discriminatory laws, but also the discriminatory enforcement of laws which are fair on their face. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). *See Commonwealth v. Lewis*, 443 Pa. 305, 279 A.2d 26 (1971).

Id. (emphasis added). Indeed, it has long been held that "the unlawful administration by the state officers of a state statute fair on its face, resulting in unequal application to those who are entitled to be treated alike," is a

violation of equal protection if purposeful discrimination is shown. *Snowden v. Hughes,* 321 U.S. 1 (1944). Such discrimination may be shown on the face of the action taken itself. *Id.* at 8.

In this case, the Petitioners do not attack the statute regulating borough incorporation. However, it is clear that Petitioners are similarly situated with the petitioners in *New Morgan, Canterbury Village* and *Seven Springs,* and many other instances, all of whom were granted borough incorporation. Although each of those boroughs had few residents or landowners, the potential for more existed and all other statutory and case law criteria for borough incorporation were satisfied. Nonetheless, without explanation, the courts below denied *this* Petition on the basis that this is a "family" borough. The trial court then leapt to an unsupported and unsupportable conclusion, *nowhere even raised by those who filed objections to the Petition,* that a "great potential for misconduct" exists. (December 20, 1993 Opinion, p. 13, R. 375a). On its face, the discrimination is purposeful and violates these Petitioners' constitutional rights.

F. The decision of the lower Court is a violation of the due process guarantees of the United States and Pennsylvania Constitutions.

Petitioners' due process guarantees have also been violated. In this case, the Pennsylvania legislature in enacting Act 181 carefully excluded the instant Petition from any minimum resident requirement for borough incorporation. Nonetheless, the courts below in effect *applied* a minimum resident requirement by denying the

application on the basis that too few residents existed in the borough as proposed. This is a retroactive application of a startling judicial change in the law; no minimum number of residents had ever been required in borough incorporation until this case.

In this case, the lower courts' minimum resident requirement was clearly contrary to all existing precedent, specifically, *New Morgan, Canterbury Village, Seven Springs, Green Hills* and *Two Ponds.* Moreover, in light of the legislature's express exclusion in Act 181 of this Petition from the Act's minimum resident requirement, it certainly was unforeseeable that a court would create an ill-defined minimum resident requirement nonetheless on its own. Finally, the hardship involved should this as yet unspecified, judicially created minimum resident requirement be applied here is plain. The Petitioners have already invested hundreds of thousands of dollars in attorneys' fees, expert fees and in the preparation of development plans. One wonders why they were put to this, given that the bases [sic] upon which the hearing judge denied the Petition were a matter of record from the outset. It has long been recognized that due process involves a right to an explanation as to why a court did what it did. See *Goldberg v. Kelly, supra.* In this case, no evidence is cited, and no support is provided to support the court's fear of misconduct. There is none. Due process demands something more.

Due process has been violated.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 0155 C.D. 1994

IN RE: INCORPORATION OF THE BOROUGH
OF POCONO RACEWAY

Appeal of Pocono International Raceway, Inc.,
Joseph R. Mattioli and Rose Mattioli

BRIEF FOR APPELLANTS POCONO INTERNATIONAL RACEWAY, INC., JOSEPH R. MATTIOLI AND ROSE MATTIOLI

Appeal from the Orders of the Monroe County Court
of Common Pleas, Entered December 20, 1993
and January 19, 1994, at No. 175 Misc. Civil 1992

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* * *

STATEMENT OF QUESTIONS INVOLVED

1. Whether the lower court committed an error of law when, having found that all statutory and case law criteria for borough incorporation had been satisfied, and that the proposed borough had "common interests and needs that could best be served by a borough government," it did not submit the question of borough incorporation to the residents of the proposed borough?

2. Whether the lower court committed an error of law when it denied borough incorporation on the basis that the proposed borough had too few residents at that time, when this proceeding had been specifically excluded from pending legislation which established for the first time a minimum resident requirement?

3. Whether the lower court committed an error of law and/or abused its discretion when it denied borough incorporation on the basis that "family boroughs" created a "great potential for misconduct," where such speculation has no statutory basis, and where nothing in the record in any way suggests such a potential and when the issue was not even raised by the exceptants?

4. Whether the decision of the lower court violates the equal protection guarantees of the Federal and State Constitutions in denying borough incorporation to the Petitioners on the basis that the proposed borough had too few residents, when no other petitions were ever denied on that basis?

5. Whether the decision of the lower court violates the due process guarantees of the Federal and State Constitutions in that the Court created a theretofore non-

existent and unforeseeable requirement that a proposed borough must have some unstated minimum number of residents, and applied this requirement retroactively to this Petition, and where the Court's determination that a "great potential for misconduct" exists was sheer speculation and without any evidentiary basis or legal support?

* * *

4. The decision of the lower Court is a violation of the equal protection guarantees of the United States and Pennsylvania Constitutions.

As stated by the Pennsylvania Superior Court in *Commonwealth v. Stinnett*, 356 Pa. Super. 83, 514 A.2d 154 (1986):

> The Equal Protection Clause in the United States Constitution is directed at every form of state action – legislative, executive, and *judicial*. *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). It not only proscribes the enactment of discriminatory laws, but also the discriminatory enforcement of laws which are fair on their face. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). *See Commonwealth v. Lewis*, 443 Pa. 305, 279 A.2d 26 (1971).

Id. (emphasis added). Indeed, it has long been held that "the unlawful administration by state officers of a state statute fair on its face, resulting in unequal application to those who are entitled to be treated alike," is a violation of equal protection if purposeful discrimination is shown. *Snowden v. Hughes*, 321 U.S. 1 (1944). Such discrimination

may be shown on the face of the action taken itself. *Id.* at 8.

In this case, the Petitioners do not attack the statute regulating borough incorporation. However, it is clear that Petitioners are similarly situated with the petitioners in *New Morgan, Seven Fields, Seven Springs* and *Chilton*, all of whom were granted borough incorporation. Although each of those boroughs had few residents or landowners, the potential for more existed and all other statutory and case law criteria for borough incorporation were satisfied. Nonetheless, without explanation, the Court below denied *this* Petition on the basis that this is a "family" borough. The Court then leapt to an unsupported and unsupportable conclusion, *nowhere even raised by those who filed objections to the Petition*, that a "great potential for misconduct" exists. (December 20, 1993 Opinion, p. 13, R. 375a). On its face, the discrimination is purposeful and violates these Petitioners' constitutional rights.

5. The decision of the lower Court is a violation of the due process guarantees of the United States and Pennsylvania Constitutions.

Petitioners' due process guarantees have also been violated. In this case, the Pennsylvania legislature in enacting Act 181 carefully excluded the instant Petition from any minimum resident requirement for borough incorporation. Nonetheless, the lower Court below in effect *applied* a minimum resident requirement by denying the application on the basis that too few residents existed in the borough as proposed. This is a retroactive application of a startling judicial change in the law; no

minimum number of residents had ever been required in borough incorporation until this case.

In *Chevron Oil v. Husen*, 404 U.S. 97 (1971), the United States Supreme Court set forth the test for deciding whether a decision should be retroactively applied:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., *Hanover Shoe v. United Shoe Machinery Corp.*, supra, at 496, 20 L Ed 2d at 1243, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen v. State Board of Elections*, supra, at 572, 22 L Ed 2d at 20. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, supra, at 629, 14 L Ed 2d at 608. Finally we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma*, supra, at 706, 23 L Ed 2d at 652.

Chevron Oil v. Husen, at 106.

In this case, the lower Court's minimum resident requirement was clearly contrary to all existing precedent, specifically, *New Morgan, Seven Fields, Seven Springs,*

Green Hills, Two Ponds and *Chilton*. Moreover, in light of the legislature's express exclusion in Act 181 of this Petition from the Act's minimum resident requirement, it certainly was unforeseeable that a court would create an ill-defined minimum resident requirement nonetheless on its own. Finally, the hardship involved should this as yet unspecified, judicially created minimum resident requirement be applied here is plain. The Petitioners have already invested hundreds of thousands of dollars in attorneys' fees, expert fees and in the preparation of development plans. One wonders why they were put to this, given that the Court's basis for denying the Petition was apparent from the outset.

Finally, it has long been recognized that due process involves a right to an explanation as to why a court did what it did. As stated by the United States Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970):

> Finally, the decision-maker's conclusion- . . . must rest solely on the legal rules and evidence adduced at the hearing. *Ohio Bell Tel. Co. v. PUC*, 301 US 292, 81 L Ed 1093, 57 S Ct 724 (1937); *United States v. Abilene & S.R. Co.*, 265 US 274, 288-289, 68 L Ed 1016, 1022, 1023, 44 S Ct 565 (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. *Wichita R. & Light Co. v. PUC*, 260 US 48, 57-59, 67 L Ed 124, 129, 130, 43 S Ct 51 (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.

In this case, no evidence is cited, and no support is provided to support the court's fear of misconduct. There is none. Due process demands more rationality.

Due process has been violated.

* * *

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

IN RE:	INCORPORATION	:	No. 175
	OF BOROUGH OF	:	MISC. 1992
	POCONO RACEWAY	:	

OPINION

A Petition was filed on October 5, 1992, to incorporate a certain area of land in Tunkhannock Township as the Borough of Pocono International Raceway. A Borough Advisory Committee (hereinafter Committee) was appointed and filed a majority and two minority reports. The majority report of the Committee recommended that the Petition for Incorporation be approved. The Court, after reviewing the Committee Reports and the evidence presented to the Committee, denied the Petition for Incorporation by Order of December 20, 1993. Petitioners filed Exceptions and Motions for Post-Trial Relief and for Reconsideration on December 29, 1993. Oral argument on the Exceptions was held on January 11, 1994, and this matter is now properly before the Court for disposition.

DISCUSSION

The Petitioners raise several arguments in their exceptions. First, the Petitioners assert that if the Court finds that the statutory criteria is met, it shall certify the matter for a vote within the proposed borough. The Petitioners rely on the following statute: "The court, if it shall find, after hearing and the advice of the committee, that

the conditions prescribed by this section have been complied with, shall certify the question to the board of elections of the county for a referendum vote of the residents of the proposed borough." 53 P.S. §45202(d). Based on this statute, the Petitioners argue that once the Court found that all statutory and case law criteria were satisfied, the Court was compelled to approve the Petition. We disagree. The statute specifically states that the court is to have a hearing and to consider the advice of the committee. This implies that an independent determination of the matter is to be made by the Court following the decision of the Committee. Additionally, the Committee is not restricted to the considerations in the statute. *See,* 53 P.S. §45202(c). In fact, the courts have condoned the consideration of factors not listed in the statute; whether the borough is a harmonious whole and whether the proposed borough has geographic integrity. *IN RE Incorporation of New Morgan, Appeal of Caernarvon Township,* 527 Pa. 226, 232-233, 590 A.2d 274, 276-277 (1991), cert. denied, ___ U.S. ___, 112 S.Ct. 179, 116 L.Ed.2d 141 (1991); *In Re Incorporation of the Borough of Glen Mills, Appeal of Glen Mills Schools,* 125 Pa. Cmwlth. 604, 607, 558 A.2d 592, 594 (1989), alloc. denied, *Petitions of Glen Mills Schools,* 523 Pa. 652, 567 A.2d 652 (1989). thus, we believe that the consideration of the number of residents within the proposed borough, the relationship between those residents and the business enterprise of the proposed borough were proper.

Second, the Petitioners alleged that the Court improperly considered the provisions of Act No. 181 of 1992. The Court clearly stated within its Opinion that this Act did not apply to the present Petitions. The Court

merely noted the change in the requirements under the Act and did not use the Act as a basis for its opinion. This reference to the Act is dicta, and thus, we find this argument to be without merit.

Third, the Petitioners argument that the Court's decision was based on the Court's perceived *potential* for misuse of borough powers and that such considerations were speculative, not relevant and not supported by the record. As previously noted, we believe that the Court is to make an independent determination of the Petition for Incorporation and is permitted to consider factors not specifically listed in the statute. We find that the number of borough residents, their relationship and the business involved are relevant considerations. Additionally, evidence was presented related to the above listed factors. Also, the chairman of the Committee, a member of the majority, stated within the committee Reports that he had reservations regarding the number of the borough's total residents. Thus, we find that the Court's considerations and conclusions in this matter were proper.

Finally, the Petitioners contend that the Court's decision was a violation of the Petitioners' right to equal protection under the laws and due process. Further, it is asserted that the Petitioners were denied the benefits of incorporation which were erroneously withheld, based on the Court's perception that a "family" borough should not be incorporated. We find these arguments to be without merit. As we have previously found, the Court's considerations of the number of borough residents, their relationships and the borough's business were proper. Thus, we do not find any violation of the Petitioners' right to equal protection of the laws. Additionally, the

Petition was given full consideration by the Committee and the Court. We find no violation of the Petitioners' rights to due process. Moreover, the Court's decision recognizing the potential problems of family boroughs was a proper exercise of its discretion in reaching an independent determination of the Petition.

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

IN RE:	INCORPORATION OF BOROUGH OF POCONO RACEWAY	: : :	No. 175 MISC. 1992

ORDER

AND NOW, this 19th day of January, 1994, Petitioners' Exceptions and Motions For Post-Trial Relief and For Reconsideration are DENIED.

BY THE COURT:

/s/ James R. Marsh
Sr. J.

cc: Ralph A. Matergia, Esq.
Richard DiSalle, Esq.
Steven Petrikis, Esq.
Edward J. Hardiman, Esq.
Therese Anne Hardiman, Esq.
David A. Martino, Esq.
Andrew Mutch Knowlton, Esq.
Dr. W. Edmund Magann
Joseph R. Mattioli, III
Walter McKim
Paul Wieand, Jr.
Richard Hayman
John Woodling, Planning Commission

IN THE COURT OF COMMON PLEAS OF
MONROE COUNTY, PENNSYLVANIA
CIVIL DIVISION

IN RE: INCORPORATION	)	
OF BOROUGH	)	No. 175
OF POCONO RACEWAY	)	Misc. Civil 1992

PETITIONER'S EXCEPTIONS AND MOTIONS FOR POST-TRIAL RELIEF AND FOR RECONSIDERATION

AND NOW comes Petitioners, by their undersigned counsel, and file the following Exceptions and Motions for Post-Trial Relief and for Reconsideration, and respectfully set forth as follows:

1. On October 5, 1992, Pocono International Raceway, Inc. and Joseph R. Mattioli and Rose Mattioli filed a Petition for Incorporation ("Petition") requesting that a certain tract of land situate [sic] in Tunkhannock Township, Monroe County, Pennsylvania, be incorporated as the Borough of Pocono Raceway.

2. By Order dated September 1, 1993, the Court appointed a Borough Advisory Committee ("Committee").

3. Pursuant to Pennsylvania's Borough Code, 53 P.a. § 45001 *et seq.*, and, in particular, those provisions relating to the incorporation of boroughs, the Committee held hearings regarding the proposed incorporation throughout October of 1993.

4. On November 18, 1993, the Committee issued its report regarding the incorporation of the proposed borough. All five members of the Committee concluded,

unanimously, that all statutory and case law criteria for the incorporation of the borough had been satisfied by the Petitioners. The Committee voted three in favor of and two against the incorporation of the proposed borough.

5. On December 1, 1993, this Court held oral argument on the Petition.

6. By Opinion and Order dated December 20, 1993, this Court made findings of fact which established that all statutory and case law criteria for the incorporation of a borough had been satisfied by the Petitioners.

7. Notwithstanding said findings, this Court nevertheless denied the Petition. Petitioners except to the Court's denial and move this Court to reconsider its Order and enter an Order granting the Petition for Incorporation for the following reasons:

(a) Pursuant to 53 P.S. § 45202(d), if the Court finds that the statutory conditions prescribed by § 202 have been complied with it "*shall* certify the question to the Board of Election of the County for a referendum vote of the residents of the proposed borough." (Emphasis added.) Having found that all statutory and case law criteria for the creation of a borough have in fact been satisfied, this Court was compelled to approve the Petition.

(b) This Court improperly considered the provisions of Act No. 181 of 1992 in denying the Petition. Although that Act does require at least 500 residents for the incorporation of a proposed borough subject to that Act, the Petition presently before the Court is not included within the scope of that Act. In fact, pursuant to

§ 3(b) of that Act, the legislature directed that in counties of the fifth class, such as Monroe County, the Act was to apply only to applications and petitions which were presented after the effective date of the Act, specifically, December 18, 1992. As the present Petition was filed on October 5, 1992, the Act was not applicable to the Petition. Accordingly, utilization of a five hundred resident requirement as a basis to conclude nonetheless that insufficient residents existed in this case was improper. To claim that the five hundred resident requirement demonstrated a legislative intent to "discontinue the incorporation of boroughs with few residents as has been allowed in the past," and then to utilize this intent to deny incorporation in this case, is to read the specific exclusion out of the Act.

(c) In denying the Petition on the basis of a perceived *potential* for misuse of borough powers, this Court engaged in speculation and considered matters which not only are not relevant to the issue of borough incorporation, but which were not part of the record.

(d) Alternatively, this Court abused its discretion in determining that borough incorporation should not be granted because of the *potential* for misuse of borough powers by the Petitioners, when not even a suggestion of such appears in the record.

(e) The Court's denial of the incorporation of the borough, despite the fact that all statutory and case law criteria for borough incorporation were and are satisfied, is a violation of equal protection of the laws under the United States Constitution and the Pennsylvania Constitution.

Specifically, although the Petitioners are similarly situated to other Petitioners who satisfied statutory and case law criteria for borough incorporation and whose petitions for incorporation were granted, this Petition was denied and the benefits of borough incorporation were withheld on the basis of the Court's perception that a "family" borough should not be incorporated.

(f) This Court's Order denying the Petition for Incorporation is a violation of due process under the United States Constitution and the Pennsylvania Constitution as Petitioners have been denied the benefits of borough incorporation on the basis of irrelevant and speculative considerations, without due process of law.

(g) This Petition was erroneously denied and the benefits of borough incorporation were erroneously withheld on the basis of the Court's perception that a "family" borough should not be incorporated.

8. As the transcripts of the Committee's hearings have already been filed, no additional transcription is necessary for resolution of these motions.

WHEREFORE, Petitioners request this Court to enter an Order reversing its prior determination, and granting

the Petition for Incorporation of the Borough of Pocono Raceway.

Respectfully submitted,

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COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

IN RE: INCORPORATION	:	No. 175
OF BOROUGH OF	:	MISC. CIVIL 1992
POCONO RACEWAY	:	

OPINION

A Petition was filed on October 5, 1992, to incorporate a certain area of land in Tunkhannock Township (hereinafter Township) as a borough.[1] The proposed borough would be called the Borough of Pocono International Raceway. The Court determined that the Petition met all the legal filing requirements and appointed a Borough Advisory Committee (hereinafter Committee) on September 1, 1993. The Committee was appointed to take testimony, deliberate and make a recommendation to the Court as to whether or not the Petition for Incorporation should be approved. Committee meetings and hearings were held on September 9, 1993, October 4, 5, 6, 7 and 8, 1993 and November 4, 10, 17, 1993.

The Court would like to recognize the efforts of the Committee. We appreciate the large amount of time devoted to hearings, meetings and deliberations. We thank the Committee for its role in these proceedings. Additionally, the Court wishes to thank John Woodling

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[1] One of the attorneys for the Petitioners is Judge Richard DiSalle. Through these proceedings, the Court has referred to Judge DiSalle as Attorney DiSalle to avoid any possible confusion regarding his role as an attorney. However, we wish to recognize his proper title as Judge DiSalle.

for his role as advisor to the Committee. We appreciate the time and services given to the Committee by Mr. Woodling.

The majority report filed by the Committee recommended that the Petition for Incorporation be approved. Two minority reports were also filed by the Committee. Portions of one of the minority reports contains factual allegations not supported by the evidence. These allegations were disregarded by the Court. The Court held oral argument on December 1, 1993. At that time, Petitioners filed Suggested Findings of Fact and Conclusions of Law and the Davenports and Tunkhannock Township lodged Memoranda of Law. The Court has carefully considered the testimony heard by the Committee, the Committee Reports and legal briefs and findings filed by counsel. This matter is now properly before the Court for disposition.

DISCUSSION

The Court, after receiving the advice of the Committee and holding a hearing, shall determine if the requirements to form a borough have been met. 53 P.S. §45202(d).

The statute provides three areas that the Committee must consider in reaching its findings relating to the desirability of the proposed incorporation. 53 P.S. §45202(c). However, the Committee is not limited to a consideration of only these three areas.

First, the Committee is to consider the proposed borough's ability to obtain or provide adequate and reasonable community support services such as police protection, fire protection and other appropriate community facility services. The entire Committee agreed that the proposed borough had the ability to provide these services. (Committee Report, pg. 52). A majority of the Committee found that "there can be no doubt whatsoever that the proposed borough would be able to provide the same level of services currently provided by the Township." (Committee Report, pg. 4). We adopt the Committee's findings that the proposed borough has the ability to provide police protection, fire protection and other appropriate community facility services such as emergency services, water, sewage disposal and traffic control. In fact on peak race days, the proposed borough currently provides municipal-type services for a large population.

Second, the Committee is to consider the existing and potential commercial, residential and industrial development of the proposed borough. The Petitioners presented a plan for the development of the proposed borough. Already existing within the area of the proposed borough is Pocono International Raceway and several homes. The plan for development contains an area called Raceway Village, which is to contain 254 lots for single family, detached homes on 130 acres. (Committee Report, pg. 10). Specific types of non-residential development are also being considered including: an environmental/ecological showcase facility, an indoor arena/exhibition hall/convention center, an indoor theme park and complementary commercial development. (Committee Report, pg. 16). The entire Committee found that the proposed borough

has existing and/or potential commercial, residential and also an industrial area, which could be developed or could create an industrial area if desirable. (Committee Report, pg. 52). Additionally, the majority of the Committee found the proposed borough's existing and potential development to be consistent with the desirability of the proposed borough. We adopt these findings.

Third, the Committee is to address the financial or tax effect on the proposed borough and existing governmental unit or units. The entire Committee agreed that the proposed borough could provide finances to support itself. (Committee Report, pg. 52). We adopt this finding. Turning to the tax effect on existing governmental units, we find that there will be no effect on Pocono Mountain School District or Monroe County, as the proposed borough will remain as part of both these governmental units. It is estimated that Tunkhannock Township would experience an immediate loss of revenue of $165,585 as a result of the proposed incorporation. (Committee Report, pg. 20). The amount of $165,585 is calculated based on the following amounts: property tax of $5,435, real estate transfer tax of $550, licenses, permits, etc. of $4,175 and amusement taxes (paid for 1993 through October 1, 1993) of $155,425. *Id.* We note that the majority of the amount of taxes collected and turned over by the Raceway are from the amusement tax. This amusement tax is collected from patrons who visit the Raceway. In this instance, the Raceway acts as a tax collector for the Township as distinguished from a taxpayer. This tax collector concepts should be kept in mind throughout this opinion.

A majority of the Committee found that "[i]f Pocono Raceway were to incorporate as a borough, the impact on

the tax revenues of Tunkhannock Township would be minimal, assuming that the Township would realign its tax structure to include an earned income tax." (Committee Report, pg. 29). In reaching this conclusion, the majority first examined the Township's 1993 projected budget which projects that the revenues from the amusement tax will be $50,000 rather than the $155,000 which has actually been collected. (Committee Report, pg. 23-24). This projected budget also allocates $60,000 for the current litigation and projects a surplus of $33,000. (*Id.*) The actual surplus for 1993 will be over $133,000. (*Id.*) A majority of the Committee also noted that the Township Financial Forecast and Financial Projection identified that the millage rate for 1994 would increase from 5 mills to 7 mills which would raise additional revenue for the Township. (Committee Report, pg. 25). Additionally, a majority of the Committee finds that Tunkhannock Township is one of only two municipalities in Monroe County that does not have an earned income tax. (Committee Report, pg. 26). Monroe County has twenty municipalities. (Committee Report, pg. 27). The earned income tax is levied by the municipality of employment and is credited back to the municipality of residence, if the municipality of residence levies an earned income tax. (Committee Report, pg. 26). If the municipality of residence does not levy an earned income tax then the tax is retained by the municipality of employment. (*Id.*).

The Township Financial Forecast shows that from 1994 through 1998, the Township is expected to receive 25.7% of its income from the Raceway. (Committee Report, pg. 28). The expenditures that the Township presently incurs for the Raceway is 1.7%. (*Id.*)

The Court notes that the Township has been feeding off the taxes collected by the Raceway to support its municipality. The Township has no earned income tax and a low millage rate. Additionally, every year the Township is underbudgeting as well as budgeting a surplus. We also note that the Raceway may have a remedy to prevent the Township's consistent underbudgeting. The Raceway may bring an action to demand that the Township pass a correct budget which may have the effect of lowering taxes on tickets.

Throughout these proceedings, there has been a constant allegation that the Raceway wants to incorporate so that it can be more profitable and earn more money. There is nothing improper about the Raceway's desire to increase profits. The Township has been consistently budgeting a surplus and Township officials and employees, several of whom are in the same family, have been allotted large salaries for ordinary jobs. There is nothing in this proceeding that arouses sympathy for either side.

A majority of the Committee found that "[t]here appears to be a 'love/hate' perception of the Raceway by the Township, in that the Township loves the income that the Raceway generates for the Township, but has exhibited no reasonable concern, sensitivity, or support of the Raceway's current or potential needs." (Committee Report, pg. 34). The legislature should require some accountability by municipalities as to their budgeting procedure and operations, rather than allowing the Township to operate unchecked.

A majority of the Committee further found that the proposed development would increase the value of the

property tax base of the area, which could provide spill-over benefits to Tunkhannock Township. (Committee Report, pg. 21). If this new development were built with the Raceway as part of the Township, it might be difficult for the Township to provide the services necessary for the development without imposing an additional tax burden on all Township residents. (Committee Report, pg. 29).

Based on the foregoing, we adopt the majority's finding that the Raceway's proposed incorporation would have a minimal impact on the tax revenue of the Township providing that the Township would realign its tax structure.

In addition to the three areas listed in the statute, the Committee also considered whether the proposed incorporated area is a harmonious whole with common interests and problems which can be properly served by a borough government. The Pennsylvania Supreme Court found this to be a proper consideration for a Borough Advisory Committee. *In Re Incorporation of Borough of New Morgan, Appeal of Caernarvon Township,* 527 Pa. 226, 232-233, 590 A.2d 274, 276-277 (1991), cert. denied, ___ U.S. ___, 112 S.Ct. 179, 116 L.Ed.2d 141 (1991).

The proposed borough will be oriented towards visitors and special events with the ability to accommodate large influxes of people. (Committee Report, pg. 31, 33). A majority of the Committee found that the proposed plans for the borough were proportionate, orderly and a pleasing arrangement. (Committee Report, pg. 31). The majority further found that the proposed borough desires to incorporate due to the need for municipal services to sustain current economic activity and promote future

development. (Committee Report, pg. 32). The proposed new development within the borough will require unique and higher levels of services than those of the Township. (Committee Report, pg. 31). There is a gap between the Petitioner's needs and the Township's ability or willingness to service those needs. (Committee Report, pg. 32). A borough government would best serve the existing and potential needs of the Petitioners. (Committee Report, pg. 34).

Based on the foregoing, we adopt the conclusion of the entire Committee that the Petitioners have clearly established that the proposed borough is a harmonious whole with common interests and needs that can best be served by a borough government. (Committee Report, pg. 52).

The Committee further reviewed the geographic integrity of the proposed borough and whether the proposed uses of the borough would burden or be inconsistent with the surrounding Township. The Commonwealth Court of Pennsylvania has held that the geographic integrity of the proposed borough is a proper consideration. *In Re Incorporation of the Borough of Glen Mills, Appeal of Glen Mills Schools,* 125 Pa. Cmwlth. 605, 607, 558 A.2d 592, 594 (1989), alloc. denied, *Petition of Glen Mills Schools,* 523 Pa. 652, 567 A.2d 652 (1989).

The proposed borough consists of 1026 acres of land which is gently rolling, well-drained and physically well suited for development. (Committee Report, pg. 37). Most of the land within the proposed borough is currently zoned highway-commercial. (Committee Report, pg. 40). The proposed borough is mostly surrounded by land

which is commercially zoned, commercially undevelopable, publicly owned or wetlands. (Committee Report, pg. 38). A majority of the Committee found that these areas will provide a buffer and thus there is little potential for land use conflicts between the proposed borough and homes in the Township. (*Id.*) The majority further found that a portion of the Township extends into the proposed borough in the form of a "peninsula of sorts" known as Cortright Road. (Committee Report, pg. 37). Seventeen families live on Cortright Road, which consists of twenty-three lots. (*Id.*) Raceway Village (a residential development) is located on one side of Cortright Road. (Committee Report, pg. 38). On the other side of the road is Cortright field which is presently zoned highway-commercial. (*Id.*) The only services Cortright Road residents currently receive from the Township are fire and police protection. (Committee Report, pg. 39). Cortright Road is a private road, not maintained by the Township. (*Id.*) A majority of the Committee found that the Township would not have any problems continuing to provide police and fire protection to Cortright Road and that it was not a problem for the police or firemen to travel through the proposed borough to respond to Cortright Road residents. (Committee Report, pg. 39-40).

The entire Committee concluded that the geographic integrity as it relates to the Cortright Road residents (sometimes referred to as the "dirt road residents") is not a negative factor presently, would not present any problems and the situation would remain unchanged. (Committee Report, pg. 52).

Additionally, a majority of the Committee concluded that the geographic integrity of the area for the proposed

borough is suitable for incorporation, that the incorporation would not burden the surrounding townships and that the proposed uses for the borough would not be inconsistent with the surrounding townships. (Committee Report, pg. 40). The Court finds that the proposed borough has geographic integrity in that it is contiguous and does not form an isolated island within the Township.

However, the Court recognizes that there may exist some problems with the right-of-way on Cortright Road for residents living there. Some of these property owners have a right-of-way clause within their deeds. Other residents have no such clause in their deeds, but may have a right-of-way by an easement.

Additionally, we note that the Cortright Road residents would have no control over the zoning in the proposed borough. Although the residents are currently surrounded by land zoned highway-commercial, they presently have the ability to vote for the individuals who determine the zoning. However, if the proposed borough is incorporated, zoning would be determined by the borough which would be operating for its own interests and which may not be responsive to the Cortright Road residents.

The chairman of the Committee, who participated in drafting the majority report recommending incorporation, also filed his reservations about the incorporation. (Committee Report, pgs. 45-47). The chairman states that his reservation is regarding the number of the borough's total residents, about eleven. (Committee Report, pg. 45).

We note that recently the legislature has addressed this concern.

> The courts of common pleas may incorporate any contiguous area within their jurisdiction, not already incorporated or a part of an incorporated municipality and having a population of at least 500 residents, as a borough, which, after having been so incorporated, shall be a body corporate and politic by the name which shall be decreed by the court.

53 P.S. §45201 (amended December 18, 1992, P.L. ___, No. 181 §1)

Through this legislation, a trend away from the incorporation of boroughs with small populations is evident. The legislature has added a minimum population requirement for proposed boroughs. Previously, there was no population requirement. This new requirement is evidence of an intent to discontinue the incorporation of boroughs with few residents as has been allowed in the past. *See, New Morgan,* supra (allowed incorporation of an area with a limited partnership as the sole landowner and six occupied homes within the area); *In Re Incorporation of Borough of Seven Fields, Appeal of Canterbury Village, Inc.,* 75 Pa. Cmwlth. 334, 462 A.2d 865 (1983) (allowed incorporation with one corporate owner, no residents at the time the petition was filed and seventy residents at the time of the hearing.)

We recognize that the new population requirement does not apply to this case. Under Section 3 of Act 1992, Dec. 18, P.L. ___, No. 181, the new statute applies to applications and petitions presented on or after March 25, 1992, except in counties of the fifth class, where this act shall apply to applications and petitions presented on or after the effective date of this Act. Although it is not

applicable in the present case, we believe it is important to note the legislative change.

In the present case, the Petitioners are Pocono International Raceway (which is owned and operated by the Mattioli family), Joseph R. Mattioli and Rose Mattioli. Additionally, most of the residents of the proposed borough are members of the Mattioli family. This incorporation, if approved, would give one family complete governmental control. The family would have control of all the governmental powers, including physical, economic and political. Also, the family would regulate police conduct and could choose whether or not to investigate different situations. This concentration of political power among a small family group has great potential for misconduct. This is a greater concern when you consider the large number of people who are present within the borough as visitors once or twice a year. The proposed borough casts shadows of an old company town in modern dress.

The Commonwealth Court of Pennsylvania has recognized the problems of the incorporation of a borough with one land owner. "The potential for exclusion, exploitation and overreaching becomes real and ever present . . . In the end we have not come so far in our evolving history to now go backward toward creating what would ultimately become feudal-like estates." *Glen Mills*, 125 Pa. Cmwlth. at 610, 558 A.2d at 595.

Thus, we will deny the Petition for Incorporation. As we expect that this decision will be appealed, we have attempted to narrow the issue involved so that the appeal may succeed or fail based on the true issue in this case.

The same power that this Court is reluctant to give to a small family has been exercised by a small elected group within the Township. However, within the Township the residents may have their remedy at the polls.

ORDER

AND NOW, this 20th day of December, 1993, the Petition for Incorporation is **DENIED.**

BY THE COURT:

/s/ James R. Marsh
P.J.

cc: Ralph A. Matergia, Esq.
Richard DiSalle, Esq.
Steven Petrikis, Esq.
Edward J. Hardiman, Esq.
Therese Anne Hardiman, Esq.
David A. Martino, Esq.
Andrew Mutch Knowlton, Esq.
Dr. W. Edmund Magann
Joseph R. Mattioli, III
Walter McKim
Paul Wieand, Jr.
Richard Hayman
John Woodling, Planning Commission

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

IN RE: INCORPORATION OF BOROUGH OF POCONO RACEWAY	: : :	NO. 175 MISC. CIVIL 1992

OPINION

This action was commenced by the filing of a Petition for Incorporation on October 5, 1992. A hearing was held on October 30, 1992 and the Court established a schedule for Tunkhannock Township to file Exceptions to the Petition. Tunkhannock Township filed Exceptions to the Petition and a supporting brief on November 6, 1992. On November 16, 1992, Petitioners filed a Response to the Township's Exceptions and a supporting brief. Oral argument was held on these Exceptions on January 15, 1993 and at that time the Court issued an order requiring the advertisement of the Petition and allowing Exceptions to be filed by any person interested by March 1, 1993. On February 12, 1993, Exceptions and a supporting brief were filed on behalf of Charlotte Davenport, James G. Davenport and James R. Davenport (Davenports). Exceptions and a supporting brief were filed on February 26, 1993 on behalf of the Dirt Road off of Cortright Field Residents (Dirt Road Residents). On March 1, 1993, Exceptions and a supporting brief were filed on behalf of Tunkhannock Township Residents Committee (Residents Committee). Petitioners presented a Motion to Strike the Exceptions filed by the Davenports, the Dirt Road Residents and the Residents Committee on March 15, 1993. Various pleadings were filed in response to the Motion to

Strike. Petitioners filed an Amended Response to Tunkhannock Township's Exceptions on March 25, 1993. Petitioners filed Responses to the Davenports' Exceptions, the Dirt Road Residents' Exceptions and the Residents Committee's Exceptions and a supporting brief on March 29, 1993.

On March 29, 1993, a hearing was held regarding the Petitioners' Motion to Strike and related matters. The Motion to Strike was denied by a Court Order on May 13, 1993.

A hearing for the Exceptions filed by the Davenports, the Residents Committee, the Dirt Road Residents and Tunkhannock Township (Exceptants) was held on May 25, 1993. Oral argument was held on August 3, 1993 and supporting briefs were filed by all parties. This matter is now before the Court for disposition.

DISCUSSION

There are three issues that have been raised through the exceptions. Each will be addressed separately.

Procedure

Initially, the issue was raised whether the Exceptants are to file answers to the Petition. This issue is clearly addressed by the statute, which provides for exceptions to be filed following the publication of notice of the filing of the petition. *See,* 53 P.S. § 45204.

Thus, it is clear that the proper procedure is to file exceptions to the petition. Technical defects which are not raised through exceptions are deemed to be waived. *See,*

In Re Laurel Mountain, 59 Pa. Cmwlth. 532, 535, 430 A.2d 389, 390-391 (1981).

The Exceptants in this matter filed exceptions in the proper manner and no other answer is required.

Resident Freeholders

Secondly, the Exceptants assert that the Petition should be dismissed for failure of the Petitioner to obtain the signatures of a majority of the freeholders residing within the proposed borough. 53 P.S. § 45202.

The Petition is signed by Pocono International Raceway, Inc., Joseph R. Mattioli and Rose Mattioli. The Petition states that these individuals constitute a majority of the freeholders residing within the proposed borough.

A freeholder is an individual who has actual possession of land for life or a greater estate. *In Re Incorporation of the Borough of Leiperville*, 37 Del. Co. 201, 204 (1950); *In Re: Harvey's Lake Borough Incorporation (No. 1)*, 57 Luz. L. Reg. Rep. 45, 48 (1966); *Wernersville Borough*, 5 Berks 364, 368 (1908), affirmed 38 Pa. Super. 462 (1909).

An individual may have more than one residence. *Harvey's Lake*, 57 Luz. L. Reg. Rep. at 56. *Carroll Valley Borough Incorporation (No. 2)*, 60 D&C2d 536, 545-546 (1972). "Residence has been defined as 'a tarrying place for some specific purpose of business or pleasure'." *Carroll Valley*, 60 D&C2d at 546 (quoting *Lesker Case*, 377 Pa. 411 (1954)).

Individuals who reside in a proposed borough for a portion of the year, summer or seasonal residents are

considered to be resident freeholders. *Id.* at 544-546; *Harvey's Lake,* 57 Luz. L. Reg. Rep. at 57.

A corporation and a limited partnership may be considered resident freeholders. *See, In re Incorporation of Borough of New Morgan, Appeal of Caernarvon Township,* 527 Pa. 226, 238-239 n.7, 590 A.2d 274, 279-280 n.7 (1991); cert. denied, 112 S.Ct. 179, 116 L.Ed.2d 141 (1991); *In Re Incorporation of Borough of Seven Fields,* 75 Pa. Cmwlth. 334, 341, 462 A.2d 865, 869 (1983); *Wernersville,* 5 Berks at 369; *Leiperville,* 37 Del. Co. at 204.

Additionally, under the Borough Code, property owned by tenants by the entirety are considered as one freeholder rather than two freeholders. *Carroll Valley,* 60 D&C2d at 547.

It is undisputed that there are eight freeholders within the limits of the proposed borough: (1) Pocono International Raceway; (2) Joseph R. and Rose Mattioli; (3) Thomas P. and Barbara D. Mears; (4) George A. Elmy; (5) William Morrell c/o U.S. Auto Club; (6) A.J. Foyt Enterprises, Inc.; (7) MATTCO, Inc.; and (8) John A. and Joann McElroy.

Petitioners (Pocono International Raceway and Joseph R. and Rose Mattioli) state that they are a majority of the resident freeholders of the proposed borough. The status of these three entities as resident freeholders has not been challenged.[1]

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[1] We note that the Resident's Committee states within its brief filed after the May 25, 1993 hearing, that no evidence was presented that Pocono International Raceway, Joseph R. & Rose Mattioli and MATTCO, Inc. are resident freeholders. This issue

Exceptants have contended that a majority of the eight freeholders within the proposed borough must sign the petition. However, the statute requires a majority of the *resident* freeholders must sign the Petition. 53 P.S. § 45202(a).

It is undisputed that there are three resident freeholders. Petitioners stated that the properties owned by Thomas P. and Barbara D. Mears, George A. Elmy, William Morrell c/o U.S. Auto Club, A.J. Foyt Enterprises, Inc. and John A. and Joann McElroy are unimproved and that these individuals do not reside on their properties. The fact that the properties belonging to the Mears, Elmy, Morrell and Foyt Enterprises, Inc. are unimproved, has not been challenged and no evidence to the are unimproved, has not been challenged and no evidence to the contrary was presented at the May 25, 1993 hearing. Therefore, we find that Thomas P. and Barbara D. Mears, George A. Elmy, William Morrell and A.J. Foyt Enterprises, Inc. are not resident freeholders of the proposed borough.

The central issue raised through these proceedings has been whether John A. and Joann McElroy (McElroys) are resident freeholders of the proposed borough. The facts regarding the McElroy property are not in dispute. The property has a paved driveway and parking area. (N.T., 5/25/93, pg. 22, 73, 131). A double billboard and a single billboard are also located on the property. (N.T.

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was not raised in the exceptions and therefore we deem it to be waived. Additionally, we note that the status of these individuals as resident freeholders was not questioned during the May 25, 1993 hearing and no evidence was presented to the contrary.

5/25/93, pg. 22, 73, 126-127, 131-132). The billboards are owned by Pocono Outdoor Advertising and were on the property when the McElroys purchased it. (N.T., 5/25/93, pg. 121-122, 131-132, 153). Also, there is a small yellow sign on the property. (N.T., 5/25/93, pg. 23, 73, 132). The property has lights on the billboard that illuminate the property and an electrical box, but there is no phone. (N.T., 5/25/93, pg. 24, 73, 133-134). There are no structures other than the billboards on the property. (N.T., 5/25/93, pg. 63-64, 73).

The evidence regarding the McElroys' use of the property is also undisputed. The McElroys purchased the property by a Deed dated September 4, 1991 and recorded September 18, 1991. (N.T., 5/25/93, pg. 147). The McElroys have received rent from the billboards on the property. (N.T., 5/25/93, pg. 131-132). Additionally, two weekends during 1992, the McElroys allowed vendors to operate on their property and received money from the vendors. (N.T., 5/25/93, pg. 30-31, 73-74, 135-137). During one of these weekends in 1992, the McElroys sold hot dogs and soda on the property. (N.T., 5/25/93, pg. 137).

Exceptants argue that the McElroys are residents of the proposed borough because they have billboards, a paved driveway and allow vendors to sell from the property. We disagree. This falls far short of the standard for residency.

A landlord who rents a house to another and lives and works in another location is not considered to be a resident of that house. To hold that the McElroys are residents of the proposed borough would make the

owner of any improved lot (regardless of how small an improvement) a resident of that property. The distinction between a resident and non-resident would loose its significance.

We recognize that residency does not require domicile. However, the requirements for residency are clearly not met in this case. The McElroys have no substantial contact with the property. Their transient contact is insufficient to allow them to be considered as residents.

Based on the foregoing we hold that the McElroys are not resident freeholders. The Petition was signed by two of the three resident freeholders within the proposed borough, which is a majority. Therefore, the Petition is in compliance with the statute and this portion of the Exceptions will be dismissed.[2]

Geographic Integrity

Exceptants argue that the Petition should be dismissed because it is clear on its face that a portion of the township that is excluded from the proposed borough will form a peninsula that will be isolated from the remainder of the township. At oral argument, Exceptants conceded that this issue is normally handled by the Borough Advisory Committee and that the issue was being

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[2] The Residents Committee argued in its final brief that the signatures were not obtained within three months of the presentation of the Petition. This issue was not raised in the Exceptions and is deemed to be waived. However, we also note that all the Petitioners signed verifications which were notorized on September 30, 1993, which is clearly within three months of the date the Petition was presented to the Court.

raised so that it is not considered to have been waived. The Pennsylvania Commonwealth Court has stated, "In short, we read the Act to require the court to establish a Borough Advisory Committee whenever an application in the form described in subsection (a) of Section 202 has been filed and to await the Borough Advisory Committee's advice before deciding the issue on the merits." *In re Incorporation of the Borough of Two Ponds, Appeal of Two Ponds, Inc.*, 87 Pa. Cmwlth. 324, 329, 489 A.2d 939, 941 (1985).

An application in compliance with P.S. § 45202 has been received in this case. This issue goes directly to the merits of the Petition and should first be addressed by the Borough Advisory Committee.

The Court will consider this issue when the report of the Borough Advisory Committee is received. *See, In Re Borough of Glen Mills, Appeal of Glen Mills Schools,* 125 Pa. Cmwlth. 604, 558 A.2d 592 (1989), alloc. denied, *Petition of Glen Mills Schools,* 523 Pa. 651, 567 A.2d 654 (1989), *In re Incorporation of Borough of Glen Mills,* 523 Pa. 652, 567 A.2d 652 (1989) (geographic integrity properly considered with Committee report); *Bear Creek Township v. Borough of Penn Lake Park,* 20 Pa. Cmwlth. 77, 340 A.2d 642 (1975) (the Court must consider if the area will be a harmonious whole with common interests and problems).

Therefore, this portion of the Exceptions will be dismissed.

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

IN RE: INCORPORATION OF BOROUGH OF POCONO RACEWAY	: : :	NO. 175 MISC. CIVIL 1992

ORDER

AND NOW, this 1st day of September, 1993, the Exceptions filed by Tunkhannock Township, the Davenports, the Dirt Road Residents and the Residents Committee are hereby DISMISSED.

WALTER McKIM and JOSEPH R. MATTIOLI, III are appointed to serve on the Borough Advisory Committee as residents of the proposed borough. PAUL WIEAND, JR. and RICHARD HAYMAN are appointed to the Borough Advisory Committee as residents of Tunkhannock Township not residing in the proposed borough. W. EDMUND MAGANN is appointed as Chairman of the Borough Advisory Committee as a resident of Monroe County, not residing in Tunkhannock Township or in the proposed borough. The director of the Monroe County Planning Commission shall serve as advisor to the Committee. Pursuant to 53 P.S. § 45202(c), the Borough Advisory Committee shall render expert advice and findings of fact to the Court on or before November 1, 1993. Counsel is advised to keep their schedules open for the week of November 8, 1993. Pursuant to 53 P.S. § 45202(d), the Court will set a date for hearing. The Court intends to keep this matter moving along promptly so it may be completed prior to the end of the Judge's term. In the

interest of fairness to all parties involved, it is desirable that the same Judge adjudicate the entire proceeding.

BY THE COURT:

/s/ James R. Marsh
P.J.

cc: Ralph A. Matergia, Esq.
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Steven Petrikis, Esq.
Theresa Anne Hardiman, Esq.
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John Woodling, Director
Monroe County Planning Commission

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST., AMEND. XIV, § 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE PENNSYLVANIA BOROUGH CODE (PRE-1992 AMENDMENTS), 53 P.S. § 45201

The courts of quarter sessions may incorporate any area within their jurisdiction, not already incorporated or a part of an incorporated municipality, as a borough,

which, after having been so incorporated, shall be a body corporate and politic by the name which shall be decreed by the court.

THE PENNSYLVANIA BOROUGH CODE (PRE-1992 AMENDMENTS), 53 P.S. § 45202

(a) The application for incorporation shall be by a petition signed by a majority of the freeholders residing within the limits of the proposed borough, when all parts of the proposed borough are in the same township, and, where Portions of the proposed borough are in different townships, the Petition shall be signed by a majority of the freeholders residing in each of such separate portions. The signatures must be secured within three months immediately preceding the presentation thereof to the court. Such petition shall be subscribed by and sworn to by at least one of the signers. The number of signers required to the petition shall be ascertained as of the date the petition was presented to court.

(b) The court shall establish a Borough Advisory Committee which shall consist of two residents of the proposed borough, two residents of the existing governmental unit or units recommended by the respective governing body of the unit or units and not residing within the proposed borough and one resident of the county not residing in either area who shall serve as the chairman of the committee. Such a committee shall be established when a petition is received by the court for the creation of a borough. Pursuant to this act, the members of such committee shall be appointed by and shall serve at the pleasure of the court. The members shall serve without

salary, but the court may entitle each such member to reimbursement for his actual and necessary expenses incurred in the performance of his official duties. The director of the County Planning Commission shall serve as advisor to the committee.

(c) Such committee shall, within sixty days of its creation, advise the court in relation to the establishment of the proposed borough. In particular, the committee shall render expert advice and findings of fact relating to the desirability of such an incorporation, including, but not limited to, advice as to:

(1) the proposed borough's ability to obtain or provide adequate and reasonable community support services such as police protection, fire protection and other appropriate community facility services;

(2) the existing and potential commercial, residential and industrial development of the proposed borough; and

(3) the financial or tax effect on the proposed borough and existing governmental unit or units.

(d) The court, if it shall find, after hearing and advice of the committee, that the conditions prescribed by this section have been complied with, shall certify the question to the board of elections of the county for a referendum vote of the residents of the proposed borough. Upon receipt of the certified election results, the court shall enter a final decree granting or denying the prayer of the petitioners.

THE 1992 AMENDMENTS TO THE PENNSYLVANIA BOROUGH CODE (ACT 181 OF 1992), 53 P.S. § 45201

The courts of common pleas may incorporate any contiguous area within their jurisdiction, not already incorporated or a part of an incorporated municipality and having a population of at least 500 residents, as a borough, which, after having been so incorporated, shall be a body corporate and politic by the name which shall be decreed by the court.

THE 1992 AMENDMENTS TO THE PENNSYLVANIA BOROUGH CODE (ACT 181 OF 1992), 53 P.S. § 45202

(a) The application for incorporation shall be by a petition signed by a majority of the freeholders residing within the limits of the proposed borough and by the freeholders of a majority of the territory within the limits of the proposed borough, when all parts of the proposed borough are in the same township, and, where portions of the proposed borough are in different townships, the petition shall be signed by a majority of the freeholders residing in each of such separate portions and by the freeholders of a majority of the territory in each of such separate portions. The signatures must be secured within three months immediately preceding the presentation thereof to the court. Such petition shall be subscribed by and sworn to by at least one of the signers. The number of signers required to the petition shall be ascertained as of the date the petition was presented to court.

(b) The court shall establish a Borough Advisory Committee which shall consist of two residents of the

proposed borough, two residents of the existing governmental unit or units recommended by the respective governing body of the unit or units and not residing within the proposed borough and one resident of the county not residing in either area who shall serve as the chairman of the committee. Such a committee shall be established when a petition is received by the court for the creation of a borough. Pursuant to this act, the members of such committee shall be appointed by and shall serve at the pleasure of the court. The members shall serve without salary, but the court may entitle each such member to reimbursement for his actual and necessary expenses incurred in the performance of his official duties. The director of the County Planning Commission shall serve as advisor to the committee.

(c) Such committee shall, within sixty days of its creation, advise the court in relation to the establishment of the proposed borough. In particular, the committee shall render expert advice and findings of fact relating to the desirability of such an incorporation, including, but not limited to, advice as to:

(1) the proposed borough's ability to obtain or provide adequate and reasonable community support services such as police protection, fire protection and other appropriate community facility services;

(2) the existing and potential commercial, residential and industrial development of the proposed borough; and

(3) the financial or tax effect on the proposed borough and existing governmental unit or units.

(d) After receiving the findings-of-fact and the advice of the committee, the court shall set a date for a hearing on the proposed incorporation and shall hear the parties interested and their witnesses. The court shall certify the question of the proposed incorporation to the board of election of the county for a referendum vote of the residents of the proposed borough only if it finds that the conditions prescribed by this section have been complied with and that the desirability of the proposed incorporation is supported by a preponderance of the evidence submitted at the hearing and by the committee. Upon receipt of the certified election results, the court shall enter a final decree granting or denying the prayer of the petitioners.

No. 94-1379

Supreme Court, U.S.
FILED
MAR 2 0 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

JOSEPH R. MATTIOLI, ROSE MATTIOLI and THE POCONO INTERNATIONAL RACEWAY, INC.,

Petitioners,

vs.

TUNKHANNOCK TOWNSHIP, TUNKHANNOCK TOWNSHIP RESIDENTS COMMITTEE, CHARLOTTE DAVENPORT, JAMES G. DAVENPORT AND JAMES R. DAVENPORT and THE CORTRIGHT ROAD RESIDENTS,

Respondents.

On Petition for Writ of Certiorari to the Commonwealth Court of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENT TUNKHANNOCK TOWNSHIP

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BEST AVAILABLE COPY

QUESTION PRESENTED

Does a court violate individual due process and equal process rights simply by exercising its discretion in denying an application by an automobile racetrack to become its own borough?

LIST OF PARTIES

Petitioners:

Joseph R. Mattioli, Rose Mattioli and The Pocono International Raceway, Inc.

Respondents:

Tunkhannock Township; Tunkhannock Township Residents Committee; Charlotte Davenport, James G. Davenport and James R. Davenport; The Cortright Road Residents

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The lower court's denial of the Pocono International Raceway's application to incorporate as a borough did not violate the equal protection rights of the individual family members who owned the racetrack and adjacent real estate, nor did it violate those family members' due process rights by applying a subsequent state statute creating a minimum of 500 individuals in order to incorporate a new borough.	4
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In re Incorporation of Borough of New Morgan, 527 Pa. 226, 590 A.2d 274 (1991) 9

Statutes Cited:

28 U.S.C. § 1257(a) 1

53 P.S. § 45202(c), 1966, February 1, P.L. (1965) __, No. 581, Section 202. As Amended 1981, July 10, P.L. 247, No. 80, § 1 ..... 8, 11

OPINIONS BELOW

The opinions of the intermediate appellate court, the Commonwealth Court of Pennsylvania, and the trial court, the Court of Common Pleas of Monroe County, Pennsylvania, are appended to petitioners' brief.

STATEMENT OF JURISDICTION

Petitioners claim jurisdiction based on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners quote the applicable constitutional and state statutory provisions in their brief.

STATEMENT OF THE CASE

A. Procedural History

On October 5, 1992, Petitioner, Pocono International Raceway and Joseph and Rose Mattioli, filed a Petition for the Incorporation of Borough of Pocono Raceway with the Monroe County Court of Common Pleas. The raceway is located in Tunkhannock Township.

Tunkhannock Township filed timely exceptions to the petition. On May 5, 1993, a hearing was held on those exceptions before the Honorable James R. Marsh, the lower court judge. On September 1, 1993, Judge Marsh dismissed the exceptions as to the number and sufficiency of the signatures on the petition, and reserved ruling on the geographic integrity issue until a court-appointed citizens advisory committee had completed its hearings and made their recommendations to the Court.

Judge Marsh also entered an Order appointing the citizens advisory committee. Committee hearings were held during the week of October 4, 1993.

On November 18, 1993, the citizens advisory committee rendered its recommendation to the court. On December 20, 1993, Judge Marsh issued an Opinion and Order denying the Petition for Incorporation. Petitioners filed motions for post trial relief which were denied by the court on January 19, 1994.

Petitioners appealed to Pennsylvania's intermediate appellate court, the Commonwealth Court of Pennsylvania. On July 13, 1994, that court affirmed the decision of the Monroe County Court of Common Pleas. On November 17, 1994, the highest state appellate court, the Pennsylvania Supreme Court, denied Petitioners' request for an allowance of appeal to that Court.

B. Factual History

Petitioners filed a Petition for Incorporation seeking to incorporate certain land which was located within Tunkhannock Township, Monroe County. The averments in the petition were silent as to the number and identity of the freeholders, Petitioners simply averred that they were the majority of the freeholders.

The Petitioners' exhibits, however, identified eight freeholders. The existence of those freeholders was disclosed on the face of the plot plan.

The petition was signed by only two of the eight freeholders. The only signatories to the petition were the Pocono International Raceway, Inc. and the Mattiolis. Matco, Inc., another freeholder, did not sign or execute the Petition for Incorporation.

The record also discloses that the proposed borough boundaries would result in a small portion of Long Pond Road remaining within the jurisdictional boundaries of the Township and would be wholly surrounded and isolated within the boundaries of the proposed borough. That configuration isolated and cut off any jurisdictional linkage between that segment of Long Pond Road and the remainder of the Township.

Finally, the record disclosed that the boundaries of the proposed borough would traverse and include segments of Long Pond Road and State Route 115. This configurement isolated and cut off the Township's direct jurisdictional linkage between all of the areas of the Township, over and through the two main thoroughfares within the Township.

The present actual financial and tax effect on Tunkhannock Township was admitted by all sides as substantial. In 1992, the total revenues collected by the Township amounted to $502,000 with the land within the proposed borough generating between $5,000 to $6,000 in real property taxes and $132,000 in amusement taxes. That $137,000 to $138,000 in revenue represented approximately one-third of thirty percent of the revenue collected by the Township. In 1993, the Township has received $293,414 in revenue through September. Of that, the land within the proposed borough generated between $5,000 to $6,000 in real property taxes and $152,000 in amusement taxes. That $157,000 to $158,000 in revenue represents approximately one-half or fifty percent of the revenue collected by the Township as of the date of the hearings.

Tunkhannock Township consists of 24,800 acres. Over one-half or 12,979 acres are currently non-taxable properties owned by such entities as the Commonwealth of Pennsylvania: State Forest and Game Lands (3,700 acres), Bethlehem Water Authority (8,000 acres), the Nature Conservancy (865 acres),

Tunkhannock Township (8 acres) and Monroe County (406 acres). Such acreage does not generate tax revenue for the Township and that land is not available for development.

The proposed borough is 1,026 acres in size and of that currently 706 acres is zoned Highway Commercial. It would be extremely difficult given the remaining developable land available to Tunkhannock Township to rezone another area or areas of the Township to make up for the substantial loss were the borough to be incorporated as a separate municipal entity.

REASONS FOR DENYING THE WRIT

THE LOWER COURT'S DENIAL OF THE POCONO INTERNATIONAL RACEWAY'S APPLICATION TO INCORPORATE AS A BOROUGH DID NOT VIOLATE THE EQUAL PROTECTION RIGHTS OF THE INDIVIDUAL FAMILY MEMBERS WHO OWNED THE RACETRACK AND ADJACENT REAL ESTATE, NOR DID IT VIOLATE THOSE FAMILY MEMBERS' DUE PROCESS RIGHTS BY APPLYING A SUBSEQUENT STATE STATUTE CREATING A MINIMUM OF 500 INDIVIDUALS IN ORDER TO INCORPORATE A NEW BOROUGH.

The lower court did not violate the equal protection and due process rights of the Mattioli family in denying their request for incorporation as a borough in the Commonwealth of Pennsylvania. The Raceway's petition had several defects.

Geographical integrity is a critical condition enunciated time and again in Pennsylvania appellate court decisions. Those appellate courts recognize that integrity as an indispensable factor in examining or reviewing incorporation petitions to determine if those petitions will create a "harmonious whole". *In*

re Borough of Glen Mills, 125 Pa. Cmwlth. Ct. 604, 558 A.2d 592 (1989).

Like the proposed borough in the *Glen Mills* case, the proposed borough of Pocono Raceway would isolate a segment of land, with residential dwellings, which would not be contiguous to any portion of the township except for a narrow connection along a tract known as lot number .0746. The lower courts' properly found that the creation of such a peninsula of Tunkhannock Township residents would have had an adverse effect on Tunkhannock Township, as well as those residents.

In *Glen Mills,* the proposed borough's boundaries excluded certain properties that the petitioning school did not own. The configuration wholly isolated an unused parcel of land next to the railroad tracks, a portion of land on which the federal post office was located, an unused township field house and a segment of land zoned residential that would not be contiguous to any portion of the township, except for a narrow connection at the northeastern neck of this area.

Here, the Raceway's petition isolated twenty-three residential lots and a portion of Long Pond Road, which would have remained as part of Tunkhannock Township. This is so even though the peninsula would have been wholly within the boundaries of the proposed borough, except for the connection with the Township which exists at lot number .0746. The lower courts properly relied on the *Glen Mills* case in rejecting the Raceway's argument that because of the minor nexus to the Township, that there was no adverse effect on those isolated Tunkhannock Township residents.

The *Glen Mills* court held:

> Regardless of the fact that township residents would still have access to, and use of, these properties, we believe the present and future use of those areas, however insignificant, and their location within township jurisdiction, remain matters of concern for the township. Conceivably, Glen Mills could sell its land or change its zoning. The township has a rational justification to maintain linkage with all land within its jurisdiction . . .
>
> For example, if the proposed borough ever changed the land use northwest of those township residents' property, the value or utility of that property may be affected. The owners, whose collective properties would be surrounded on all sides by municipalities other than Thornbury Township, formerly protected by the township's comprehensive zoning scheme, would have no voice in determining the treatment of the substantial area (the proposed borough) lying between them and the rest of the township . . .
>
> The concept here presented strikes at the very root and concept of government, most certainly democratic government as we understand it in America, which always rests upon the union of a group of freeholders into a self governing unit, wherein divergent groups and people through the vote express their majority will and voice.

> Here we have one landowner who now says I want to separate and govern myself.
>
> If this were allowed, how far would it go: colleges, universities, sundry institutions, corporations, large land owners, perhaps smaller too, would break off at will from Townships and into multi-separate boroughs. Each borough going its own way to create a mix of perhaps harmonious, perhaps antagonistic, but incongruous zoning or development patterns, as well as conflicting and often inconsistent services. The potential for exclusion, exploitation and overreaching becomes real and ever present.
>
> Suppose the Glen Mills School sold its property and moved, one whole Borough would then be bought, and available for unbridled and unrestricted control, except as the Borough Code might provide . . .
>
> In the end we have not come so far in our evolving history to now go backward creating what would ultimately become feudal-like estates. This is certainly not the acceptable or reasonable basis and approach to local government.

In re Borough of Glen Mills, 125 Pa. Cmwlth. Ct. 604; __, 558 A.2d 592, 594-95 (1989).

The lower courts properly recognized the concerns of isolating certain Township residents. As accurately pointed out in the *Glen Mills* case, petitions for incorporation are not bound to

development plans they submit to a citizens advisory committee for review.

Here, the Raceway's promises, representations, or expressions of good intentions do not bind them to any plan of development or use of their property incorporation. To the contrary, upon incorporation the Raceway or any successor to their title in their land can, and would have the power to enact and implement any scheme for development and any zoning, subdivision and land use legislation they so desire. This legislation would have a strong potential to adversely affect the isolated Tunkhannock Township residents.

The lower courts also properly exercised their discretion in finding that the proposed Borough of Pocono Raceway was not one harmonious whole with common interests and problems best served by borough government. Here, the proposed borough's land does not have any existing development, beyond that of a racetrack and a few residential dwellings. This land was wholly within the confines of Tunkhannock Township, and primarily zoning highway commercial with a small portion zoned residential. There was no evidence in the record that any development planned by the Raceway was inconsistent with the Township's existing zoning and subdivision land use ordinances. Clearly, there was simply no need for the Raceway to incorporate as its own separate municipal entity.

53 P.S. § 45202(c)(3) (Borough Code) requires a consideration of financial or tax effects on the proposed borough as well as the existing governmental unit. Here, the courts considered the effect on Tunkhannock Township as a result of incorporation.

In considering the loss of taxes and fees, the proper focus is on those taxes and fees which may be presently lost, not those

which may be lost in the future. *In re Incorporation of Borough of New Morgan,* 590 A.2d 274, 279 (Pa. Super. 1991).

Tunkhannock Township's 1993 revenue produced from the land within the proposed borough was in excess of $157,000. The Township's total revenue for 1993 was $293,414 as of the date of hearing. The loss of that revenue from the proposed borough's confines was substantial, and certainly provided a basis for the lower courts' refusal to grant the Petition for Incorporation.

The revenues generated by the land within the proposed borough in 1982 amounted to approximately one-third of the total revenues received by Tunkhannock Township that year. Due to the magnitude of this financial loss of Tunkhannock Township, this loss would have been difficult for the township to cure. Tunkhannock Township is primarily a rural area with little economically developable land. The population is limited, and the income levels of those persons are low.

The substantial and significant loss of revenue from the Racetrack would limit the township's ability to produce meaningful revenue to offset such loss.

In the case of the *Incorporation of the Borough of Bridgewater,* 87 Pa. Cmwlth. Ct. 599, 488 A.2d 374 (1985), the trial court found that the surrounding Township had several debts, and concluded that the proposed borough sought to escape supporting the financially troubled township. The Commonwealth Court held:

> . . . While acknowledging that the proposed Borough would probably be able to take care of itself financially, by imposing a real estate tax, the trial court held that the remained of the Township would be deprived

> of the "support and balance which is essential to preserve and develop a complete, integrated and, yet, diverse community of population, interests, and uses; all of which are essential to the stability and growth of a suburban municipality".
>
> We cannot fault the trial court in its concern for preserving the diversity of the Township necessary to support it financially and socially. Therefore, we hold that the trial court properly exercised its discretion under Section 202 in denying the Petition to Incorporate.

488 A.2d at 377.

Clearly, the financial impact on Tunkhannock Township provided sufficient basis for the lower courts to deny the petition.

Petitioners finally argue that the Common Pleas Court improperly referred to the Pennsylvania state legislature's subsequent legislation creating an application process for borough incorporation requiring a minimum of 500 signatures. Petitioners argue that the trial court improperly relied on the state statute in exercising its discretion to deny the application for incorporation. In its opinion, the lower court judge simply recognized the existence of the legislation in his opinions. In the court's opinion of December 20, 1993, the judge stated:

> We note that recently the legislature has addressed this concern . . .
>
> We recognize that the new population requirement does not apply to this case.

> Under Section 3 of Act 1992, Dec. 18, P.L. __, No. 181, the new statute applies to applications and petitions presented on or after March 25, 1992, except in counties of the fifth class, where this act shall apply to applications and petitions presented on or after the effective date of this act. Although it is not applicable in the present case, we believe it is important to note the legislative change.

Opinion of December 20, 1993.

In the court's opinion of January 19, 1994, the judge stated:

> Second, the Petitioners alleged that the Court improperly considered the provisions of Act No. 181 of 1992. The Court clearly stated within its Opinion that this Act did not apply to the present Petitions. The Court merely noted the change in requirements under the Act and did not use the Act as a basis for its Opinion. This reference to the Act is dicta, and thus, we find this argument to be without merit.

Opinion of January 19, 1994.

The Common Pleas Judge could not mark that the court was not relying on the 1992 Amendments to 53 P.S. §§ 45201, *et seq.* in denying the application. The lower courts had statutory authority to determine the desirability of the incorporation of the Raceway as its own borough. The Commonwealth Court and the Court of Common Pleas properly denied the application request after reviewing the report and recommendation from the advisory

committee, as well as holding hearings on the application. Petitioners' equal protection rights and due process rights were not violated by this judicial process. Simply because the lower courts, as affirmed by the Commonwealth Court of Pennsylvania, found that the incorporation should not occur, does not rise to the level of a constitutional violation of the petitioners' constitutional rights.

CONCLUSION

The United States Supreme Court should deny Joseph R. Mattioli, Rose Mattioli and The Pocono International Raceway, Inc.'s Petition for Writ of Certiorari, because the case presents no issue appropriate for the Court's review, and because the lower courts' holdings were not in error.

Respectfully submitted,

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Supreme Court, U.S.
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No. 94-1379

In The

Supreme Court of the United States

October Term, 1994

JOSEPH R. MATTIOLI, ROSE MATTIOLI and THE POCONO INTERNATIONAL RACEWAY, INC.,

Petitioners,

v.

TUNKHANNOCK TOWNSHIP, TUNKHANNOCK TOWNSHIP RESIDENTS COMMITTEE, CHARLOTTE DAVENPORT, JAMES G. DAVENPORT AND JAMES R. DAVENPORT and THE CORTRIGHT ROAD RESIDENTS,

Respondents.

Petition For A Writ Of Certiorari To The Commonwealth Court Of Pennsylvania

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondent Tunkhannock Township's characterization of the findings and conclusions of the trial court is inaccurate in several significant respects.

First of all, Respondents argue that the Petition for Incorporation had "several defects." (Brief in Opposition, p. 4). Neither the trial court nor the advisory committee found any defects in the Petition.

At page 5 of its Brief in Opposition, in discussing the impact of incorporation on certain Township residents, the Township argues that: "The lower courts' [sic] properly found that the creation of such a peninsula of Tunkhannock Township residents would have an adverse effect on Tunkhannock Township, as well as those residents" and states that the court had rejected the Petitioners' argument that "there was no adverse effect on those isolated Tunkhannock Township residents." To the contrary, the trial court said:

> The entire Committee concluded that the geographic integrity as it relates to the Cortright Road residents (sometimes referred to as the "dirt road residents") is not a negative factor presently, would not present any problems and the situation would remain unchanged. (Committee Report, pg. 52).
>
> Additionally, a majority of the Committee concluded that the geographic integrity of the area for the proposed borough is suitable for incorporation, that the incorporation would not burden the surrounding townships and that the proposed uses for the borough would not be inconsistent with the surrounding townships.

> (Committee Report, pg. 40). *The Court finds that the proposed borough has geographic integrity in that it is contiguous and does not form an isolated island within the Township.* (App. 47, 48) (emphasis added.)

At page 10 of its brief, the Township states: "Clearly, the financial impact on Tunkhannock Township provided sufficient basis for the lower courts to deny the petition." With respect to this issue, the trial court said " . . . we adopt the majority's finding that the Raceway's proposed incorporation would have a minimal impact on the tax revenue of the Township providing that the Township would realign its tax structure." (App. 45).

Finally, and most significantly, the Respondent states that the trial judge found that the proposed borough "was *not* one harmonious whole with common interests and problems best served by borough government" (p. 8, Brief in Opposition) (emphasis added). This statement flatly contradicts the specific finding of the trial court on this issue. In fact, the Judge stated:

> Based on the foregoing, we adopt the conclusion of the entire Committee that the Petitioners *have clearly established* that the proposed borough is a harmonious whole with common interests and needs that can best be served by a borough government. (Committee Report, pg. 52).

(App. 46) (emphasis added).

President Judge James A. Marsh of the Court of Common Pleas of Monroe County made it painfully clear in his opinion of December 23, 1993, that his *only* reason for the denial of the Petition for Incorporation was the fact that the Petitioners were members of the Mattioli family:

> . . . As we expect that this decision will be appealed, we have attempted to narrow the issue involved so that the appeal may succeed or fail based on *the true issue* in this case.
>
> The same power that this Court is reluctant to give to *a small family* has been exercised by a small elected group within the Township. However, within the Township the residents may have their remedy at the polls.

(App. 50-51).

* * *

> In the present case, the Petitioners are Pocono International Raceway (which is owned and operated by the Mattioli family), Joseph R. Mattioli and Rose Mattioli. Additionally, most of the residents of the proposed borough are members of the Mattioli family. This incorporation, if approved, would give one family complete governmental control. The family would have control of all the governmental powers, including physical, economic and political. Also, the family would regulate police conduct and could choose whether or not to investigate different situations. *This concentration of political power among a small family group has great potential for misconduct.* This is a greater concern when you consider the large number of people who are present within the borough as visitors once or twice a year. The proposed borough casts shadows of an old company town in modern dress.

(App. 50) (emphasis added).

For this reason, and this reason alone, he denied the Incorporation Petition, despite his finding that all of the

legal requirements (both statutory and case law) for the incorporation of a borough had been met. As noted in the Petition for Writ of Certiorari, no decisional or statutory law in Pennsylvania has ever denied incorporation based upon the family relationship of the incorporators.

The trial court's perverse view of the role of this family vis-a-vis its place in government has no legitimacy in a constitutional democracy dedicated to principles of equal protection and due process. Its decision should not be permitted to stand.

Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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